No. 17-1011	
Title:	Budha Ismail Jam, et al., Petitioners v. International Finance Corporation
Docketed:	January 22, 2018
Linked with 17A606	
Lower Ct:	United States Court of Appeals for the District of Columbia Circuit
Case Numbers:	(16-7051)
Decision Date:	June 23, 2017
Rehearing Denied:	September 26, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Dec 01 2017	Application (17A606) to extend the time to file a petition for a writ of certiorari from December 25, 2017 to January 25, 2018, submitted to The Chief Justice. **Main Document** **Lower Court Orders/Opinions** **Proof of Service** **Other**
Dec 11 2017	Application (17A606) granted by The Chief Justice extending the time to file until January 25, 2018.
Jan 19 2018	Petition for a writ of certiorari filed. (Response due February 21, 2018) **Petition** **Certificate of Word Count** **Proof of Service**
Feb 09 2018	Motion to extend the time to file a response from February 21, 2018 to March 23, 2018, submitted to The Clerk. **Main Document**
Feb 09 2018	Blanket Consent filed by Petitioners, Budha Ismail Jam, et al.. **Blanket Consent**
Feb 12 2018	Motion to extend the time to file a response is granted and the time is extended to and including March 23, 2018.
Feb 21 2018	Brief amicus curiae of International Law Scholars filed. **Proof of Service** **Main Document** **Certificate of Word Count**

Mar 13 2018	Motion to extend the time to file a response from March 23, 2018 to March 30, 2018, submitted to The Clerk. **Main Document**
Mar 15 2018	Motion to extend the time to file a response is granted and the time is further extended to and including March 30, 2018.
Mar 30 2018	Brief of respondent International Finance Corporation in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 18 2018	DISTRIBUTED for Conference of 5/10/2018.
Apr 18 2018	Reply of petitioners Budha Ismail Jam, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
May 14 2018	DISTRIBUTED for Conference of 5/17/2018.
May 21 2018	Petition GRANTED limited to Question 1 presented by the petition.
Jun 15 2018	Motion for an extension of time to file the briefs on the merits filed. **Main Document**
Jun 27 2018	Blanket Consent filed by Petitioner, Budha Ismail Jam, et al. **Blanket Consent**
Jul 02 2018	Motion to extend the time to file the briefs on the merits granted. The time to file the joint appendix and petitioners' brief on the merits is extended to and including July 13, 2018. The time to file respondent's brief on the merits is extended to and including August 29, 2018.
Jul 02 2018	Blanket Consent filed by Respondent, International Finance Corporation. **Blanket Consent**
Jul 03 2018	Motion to dispense with printing the joint appendix filed by petitioner Budha Ismail Jam, et al. **Main Document** **Proof of Service**
Jul 09 2018	Motion for a further extension of time to file the opening briefs on the merits filed. **Main Document**
Jul 24 2018	Motion for a further extension of time to file the briefs on the merits granted. The time to file the joint appendix and petitioners' brief on the merits is further extended to and including July 24, 2018. The time to file respondent's brief on the merits is further extended to and including September 10, 2018.

Jul 24 2018	Brief of petitioners Budha Ismail Jam, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 31 2018	Brief amici curiae of Bipartisan Members of Congress filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 31 2018	Brief amici curiae of Professors of International Organization and International Law filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 31 2018	Brief amicus curiae of United States filed. **Proof of Service** **Main Document**
Jul 31 2018	Brief amici curiae of Center for International Environmental Law, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service** **Proof of Service** **Proof of Service**
Aug 20 2018	SET FOR ARGUMENT on Wednesday, October 31, 2018
Sep 10 2018	Record requested from the U.S.C.A. Dist. of Columbia Circuit.
Sep 10 2018	Brief of respondent International Finance Corporation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 11 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Sep 12 2018	CIRCULATED
Sep 17 2018	Brief amici curiae of International Law Experts filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 17 2018	Brief amici curiae of Member Countries and the Multilateral Investment Guarantee Agency filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 17 2018	Brief amici curiae of Former Secretaries of State and Secretaries of the Treasury filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 17 2018	Brief amici curiae of Former Executive Branch Attorneys filed. (Distributed) **Main Document** **Certificate of Word Count** **Certificate of Word Count**

Sep 17 2018	Brief amici curiae of International Bank for Reconstruction and Development, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 17 2018	Brief amici curiae of African Union, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Sep 21 2018	Record from the U.S.C.A. Dist. of Columbia Circuit is electronic and located on PACER.
Oct 01 2018	Motion to dispense with printing the joint appendix filed by petitioners GRANTED.
Oct 01 2018	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 05 2018	Reply of petitioners Budha Ismail Jam, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 19 2018	Justice Kavanaugh is recused in this case.
Oct 31 2018	Argued. For petitioners: Jeffrey L. Fisher, Stanford, Cal.; and Jonathan Ellis, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Donald B. Verrilli, Jr., Washington, D. C.

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No. 17-___

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, et al.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the International Organizations Immunities Act—which affords international organizations the "same immunity" from suit that foreign governments have, 22 U.S.C. § 288a(b)—confers the same immunity on such organizations as foreign governments have under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11.

2. If not, what are the rules governing the immunity to which international organizations are entitled?

PARTIES TO THE PROCEEDING

Petitioners, all of whom were plaintiffs below, are Budha Ismail Jam, Kashubhai Abhrambhai Manjalia, Sidik Kasam Jam, Ranubha Jadeja, Navinal Panchayat, and Machimar Adhikar Sangharash Sangathan.

Respondent, the defendant in this case, is the International Finance Corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES v
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT STATUTORY PROVISIONS 1
INTRODUCTION 2
STATEMENT OF THE CASE 5
REASONS FOR GRANTING THE WRIT 11
I. This Court should resolve whether the IOIA cloaks international organizations with greater immunity than the FSIA affords to foreign states 11
A. There is an entrenched circuit split over this issue 11
B. The D.C. Circuit's rule that international organizations have greater immunity than the FSIA allows is incorrect 15
C. This Court should resolve this important issue here and now 18
II. If the IOIA confers greater immunity than the FSIA allows, this Court should settle the basic rules governing that immunity 21
A. The D.C. Circuit's "absolute immunity" rule is mistaken 21
B. The D.C. Circuit's test for finding a waiver of immunity distorts the plain language of governing law 24
CONCLUSION 27

APPENDICES

Appendix A, Opinion of the U.S. Court of Appeals for the D.C. Circuit 1a

Appendix B, Memorandum Opinion of the U.S. District Court for the District of Columbia 23a

Appendix C, Order of the U.S. Court of Appeals for the D.C. Circuit Denying Rehearing En Banc 39a

Appendix D, Relevant Provisions of the International Organizations Immunities Act, 22 U.S.C. §§ 288-288a 40a

TABLE OF AUTHORITIES

Page(s)

Cases

Aguado v. Inter-Am. Dev. Bank,
85 Fed. Appx. 776 (D.C. Cir. 2004) 19

Alfred Dunhill of London, Inc. v. Republic of Cuba,
425 U.S. 682 (1976) 22

Argentine Republic v. Amerada Hess Shipping Corp.,
488 U.S. 428 (1989) 15

Ashford Int'l, Inc. v. World Bank Grp.,
No. 1:04-CV-3822-JOF, 2006 WL 783357
(N.D. Ga. Mar. 24, 2006) 14

Atkinson v. Inter-Am. Dev. Bank,
156 F.3d 1335 (D.C. Cir. 1998) ..... *passim*

Banco de Seguros del Estado v. IFC,
Nos. 06 Civ. 2427(LAP) & 06 Civ. 3739(LAP),
2007 WL 2746808 (S.D.N.Y. Sept. 20, 2007)..... 14

Bank Markazi v. Peterson,
136 S. Ct. 1310 (2016) 21, 22, 23

Broadbent v. Org. of Am. States,
628 F.2d 27 (D.C. Cir. 1980) 13, 18

Brzak v. United Nations,
597 F.3d 107 (2d Cir. 2010)..... 2

Chickasaw Nation v. United States,
534 U.S. 84 (2001) 17

Compania Espanola de Navegacion Maritima, S.A. v. The Navemar,
303 U.S. 68 (1938) 24

Dole Food Co. v. Patrickson,
538 U.S. 468 (2003) 16

Dujardin v. Int'l Bank for Reconstruction & Dev.,
9 Fed. Appx. 19 (D.C. Cir. 2001) 19

Enterasys Networks, Inc. v. Mexmal Mayorista, S.A. de C.V. (In re Dinastia, L.P.),
381 B.R. 512 (S.D. Tex. 2007) 14

Fazzari v. Inter-Am. Dev. Bank,
254 F.3d 315 (D.C. Cir. 2000) 19

Hudes v. Aetna Life Ins. Co.,
806 F. Supp. 2d 180 (D.D.C. 2011) 19

Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co.,
264 Fed. Appx. 13 (D.C. Cir. 2008) 19

Kaiser Grp. Int'l, Inc. v. World Bank,
420 Fed. Appx. 2 (D.C. Cir. 2011) 19

Lamont v. Travelers Ins. Co.,
24 N.E.2d 81 (N.Y. 1939) 24

Nyambal v. Int'l Monetary Fund,
772 F.3d 277 (D.C. Cir. 2014) 2, 15

OSS Nokalva, Inc. v. Eur. Space Agency,
617 F.3d 756 (3d Cir. 2010) ..... *passim*

Osseiran v. Int'l Finance Corp.,
552 F.3d 836 (D.C. Cir. 2009) 9, 25

Polak v. Int'l Monetary Fund,
657 F. Supp. 2d 116 (D.D.C. 2009) 19

Price v. Unisea, Inc.,
289 P.3d 914 (Alaska 2012) 14, 15

Rendall-Speranza v. Nassim,
932 F. Supp. 19 (D.D.C. 1996) 12

Republic of Argentina v. Weltover, Inc.,
504 U.S. 607 (1992) 4, 20

Republic of Austria v. Altmann,
541 U.S. 677 (2004) ..... *passim*

Republic of Mexico v. Hoffman,
324 U.S. 30 (1945) 3, 22, 23

Ex parte Republic of Peru,
318 U.S. 578 (1943) 22

Samantar v. Yousuf,
560 U.S. 305 (2010) 21, 22

Sampaio v. Inter-Am. Dev. Bank,
468 Fed. Appx. 10 (D.C. Cir. 2012) 15, 19

Smith v. World Bank Grp.,
694 Fed. Appx. 1 (D.C. Cir. 2017) 19

The Pesaro,
277 F. 473 (S.D.N.Y. 1921) 24

Ulen & Co. v. Bank Gospodarstwa Krajowego,
24 N.Y.S.2d 201 (App. Div. 1940) 24

United States v. Deutsches Kalisyndikat Gesellschaft,
31 F.2d 199 (S.D.N.Y. 1929) 24

United States v. Yellow Cab Co.,
340 U.S. 543 (1951) 25

Verlinden B.V. v. Cent. Bank of Nigeria,
461 U.S. 480 (1983) 21, 23

Walden v. Fiore,
134 S. Ct. 1115 (2014) 6

Zuza v. Office of the High Representative,
107 F. Supp. 3d 90 (D.D.C. 2015) 16

Statutes

Foreign Corrupt Practices Act of 1977, 15
U.S.C. § 78dd-1 *et seq.* 18

22 U.S.C. § 282g 7

International Organizations Immunities Act, Pub. L. No. 79-291, 59 Stat. 669, 22 U.S.C. § 288 *et seq.* (1945) ..... *passim*

22 U.S.C. § 288 ..... 2, 14, 16

22 U.S.C. §§ 288-288*l* 3

22 U.S.C. § 288a(b) ..... *passim*

28 U.S.C. § 1254(1) 1

Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891, 28 U.S.C. § 1602-11 (1976) ..... *passim*

28 U.S.C. § 1605(a)(2) 8, 18, 20

Federal Tort Claims Act, 60 Stat. 812, 844 ch. 753, tit. IV, § 410(a) (1946) 25

Rules and Regulations

Exec. Order No. 10,680, 21 Fed. Reg. 7647 (Oct. 2, 1956) 6

Exec. Order. No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962) 2

Exec. Order No. 12,567, 51 Fed. Reg. 35,495 (Oct. 2, 1986) 2

Exec. Order No. 13,042, 62 Fed. Reg. 18,017 (Apr. 9, 1997) 2

Legislative Materials

H.R. 4489, 79th Cong. (1945) 16

H.R. Rep. No. 105-802 (1998) 18

S. Rep. No. 79-861 (1945) 17

Other Authorities

Herz, Steven, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 Suffolk Transnat'l L. Rev. 471 (2008) 20

International Finance Corporation, Articles of Agreement, 7 U.S.T. 2197 (1955) 7, 8, 25

International Finance Corporation, *Policy on Environmental and Social Sustainability* (2012) 5

International Monetary Fund, Articles of Agreement, 60 Stat. 1401 (1945) 2

Klabbers, Jan, *Contending Approaches to International Organizations, in* Research Handbook on the Law of International Organizations (Jan Klabbers & Asa Wallendahl eds., 2011) 5

Letter from Acting Secretary of State Arnold Kanter to President George H.W. Bush (Sept. 21, 1992) *in* Digest of United States Practice in International Law, 1991-1999 (Sally J. Cummins & David P. Stewart eds., 2005) 13

Nash, Marian L., *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917 (1980) 12

The Oxford Handbook of International Organizations (Jcob Katz Corgan et al., eds. 2016) 1

United States, Brief for the United States as Amicus Curiae, *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465) 13, 18

U.S. Dep't of State, *Constitutionality of the Bretton Woods Agreement Act* (1945) 25

World Bank, Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440 (1945) 25

PETITION FOR A WRIT OF CERTIORARI

Petitioners Budha Ismail Jam, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit in No. 16-7051.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit (Pet. App. 1a) is published at 860 F.3d 703 (D.C. Cir. 2017). The relevant opinion of the district court (Pet. App. 23a) is published at 172 F. Supp. 3d 104 (D.D.C. 2016).

JURISDICTION

The opinion of the court of appeals was issued on June 23, 2017. Pet. App. 1a. The court of appeals denied rehearing en banc on September 26, 2017. Pet. App. 39a. On December 11, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 25, 2018. *See* No. 17A606. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions of the International Organizations Immunities Act, 22 U.S.C. §§ 288-288a, are reproduced at Pet. App. 40a-42a.

INTRODUCTION

The past several decades have witnessed a proliferation of "international organizations"—that is, public organizations in which multiple countries are members pursuant to treaties or other foundational laws. *See generally* The Oxford Handbook of International Organizations, at v-vi (Jacob Katz Cogan et al. eds., 2016). These organizations pursue a wide range of ends—ranging from providing health care to managing fisheries to financing economic development. Examples (just to name a few to which the United States belongs) include the World Trade Organization, *see* Exec. Order No. 13,042, 62 Fed. Reg. 18,017 (Apr. 9, 1997); the Inter-American Investment Corporation, *see* Exec. Order No. 12,567, 51 Fed. Reg. 35,495 (Oct. 2, 1986); and the International Pacific Halibut Commission, *see* Exec. Order. No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962). All told, there are currently over eighty formally designated international organizations of which the United States is a member. *See* 22 U.S.C. § 288 (providing process for presidential designation); *id.* app. (listing designated organizations).

Some of these international organizations are immune from suit in U.S. courts by virtue of their founding treaties. *See, e.g.*, *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 281 (D.C. Cir. 2014) (noting that the International Monetary Fund's Articles of Agreement expressly provide immunity from "every form of judicial process" (quoting Articles of Agreement of the IMF, Art. IX, § 3, Dec. 27, 1945, 60 Stat. 1401, 1413)); *Brzak v. United Nations*, 597 F.3d 107, 110-12 (2d Cir. 2010) (describing the

Convention on Privileges and Immunities of the United Nations, "which extends absolute immunity to the United Nations"). But most are not. For those organizations, immunity is governed by the International Organizations Immunities Act ("IOIA" or the "Act"). *See* Pub. L. No. 79-291, 59 Stat. 669 (1945) (codified as amended at 22 U.S.C. §§ 288-288*l*).

Enacted in 1945, the IOIA affords international organizations certain privileges and immunities, including "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). The Act also allows international organizations to "waive their immunity." *Id.*

When Congress enacted the IOIA, the question whether a foreign government was entitled to immunity from suit was a political one. Courts deferred to the judgment of the political branches, including the Executive's case-by-case determinations. *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35-36 (1945). Absent explicit instructions, courts implemented the State Department's views as best they could.

In the 1952 "Tate Letter," the State Department formally "announced its adoption of the restrictive theory of immunity, under which immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *See Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998) (citing Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Acting Attorney General Philip B. Perlman (May 19, 1952));

see also Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612 (1992). Congress later codified the restrictive theory of foreign sovereign immunity—and gave courts the sole authority to apply it—in the Foreign Sovereign Immunities Act of 1976 ("FSIA"). Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1602-11).

The question presented here is whether the IOIA's language conferring the "same immunity from suit . . . as is enjoyed by foreign governments" means that the rules governing immunity for international organizations track those in the FSIA. The Third Circuit has held that, as a matter of plain language and common sense, the IOIA does so. *See OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 762-64 (3d Cir. 2010). Indeed, all but eighteen of the currently designated IOIA organizations—including respondent, the International Finance Corporation ("IFC")—were designated after 1952; it would be especially odd for them to be entitled to a form of immunity that no longer prevailed time of their designation. "The considered view of the Department of State" is likewise that "the immunity of international organizations under the IOIA was not frozen as of 1945, but follows developments in the law of foreign sovereign immunity under the FSIA." Pet. App. 15a (Pillard, J., concurring).

The D.C. Circuit, however, has squarely "rejected such an evolving notion of international organization immunity." Pet. App. 5a (citing *Atkinson*, 156 F.3d at 1341). And in the decision below, it reaffirmed its view that the IOIA gives international organizations "the immunity that foreign governments enjoyed *at the time the IOIA was passed*." *Id.* 4a (emphasis

added). Notwithstanding this Court's explanations that immunity law as of 1945 depended on case-by-case views of the Executive Branch, the D.C. Circuit has further held that the law at that time conferred "virtually absolute immunity" on foreign governments. *Id.* 4a (quoting *Atkinson*, 156 F.3d at 1340). Other courts agree. *See infra* at 14.

This Court should resolve this conflict. International organizations play an ever-increasing role in the economic landscape of this country and the world, and their actions "have far-reaching consequences." Jan Klabbers, *Contending Approaches to International Organizations*, *in* Research Handbook on the Law of International Organizations 3, 3 (Jan Klabbers & Åsa Wallendahl eds., 2011). Yet courts are generally the only available forum for holding such organizations to their legal obligations. Therefore, the question whether they are absolutely immune from any kind of lawsuit—no matter how strictly commercial their activities; no matter how egregiously unlawful their actions; and no matter the views of the Executive Branch—is extremely important. Even more to the point, no organization should be essentially above the law without this Court having at least considered the issue.

STATEMENT OF THE CASE

1. This case arises out of a commercial development project financed by respondent, the International Finance Corporation. Chartered in 1955 and headquartered in Washington, D.C., the IFC's stated "mission is to fight poverty." IFC, *Policy on Environmental and Social Sustainability* 2 (2012), http://bit.ly/2mJbbiR. Specifically, it provides loans in

the developing world to private corporations, at profit-generating interest rates, for projects that would otherwise have difficulty attracting private capital. Pet. App. 3a. The IFC is composed of 184 member countries, including the United States. *Id.* 24a. It is also "among the organizations that have been . . . designated" under the IOIA as "international organizations." *Id.* 29a (citing Exec. Order No. 10,680, 21 Fed. Reg. 7647 (Oct. 2, 1956)).

In 2008, the IFC provided $450 million in loans "for construction of the Tata Mundra Power Plant in Gujarat, India." Pet. App. 2a-3a.[1] In accordance with the IFC's policy to prevent social and environmental damage, the loan agreement afforded the IFC "supervisory authority" over the project and "included an Environmental and Social Action Plan designed to protect the surrounding communities" from harm. *Id.* 3a. Should the local loan recipient fail to abide by these conditions, the IFC "could revoke financial support for the project." *Id.*

According to the IFC's own ombudsman, however, the IFC engaged in "inadequate supervision of the project." Pet. App. 3a. "[T]he plant's construction and operation did not comply with the Plan." *Id.* "Yet the IFC did not take any steps" to address the situation. *Id.* And it still has not taken any meaningful steps.

The result is a "dismal picture." *See* Pet. App. 2a n.1. The power plant has "devastated" the local environment—and, indeed, the local way of life. *Id.* 2a. To name just a few of the calamities, neighboring

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[1] Because this appeal arises from a motion to dismiss, all allegations in the complaint must be taken as true. *See, e.g.*, *Walden v. Fiore*, 134 S. Ct. 1115, 1119 n.2 (2014).

villagers and farmers are no longer able to procure fresh water because the plant's construction caused "[s]altwater intrusion into the [local] groundwater." *Id.* 2a n.1. "[T]he plant's cooling system discharges thermal pollution into the sea, killing off marine life on which fisherman rely for their income" and local residents rely for nourishment. *Id.* And "coal dust and ash"—released from a conveyor system that brings coal to the plant—"disperse into the atmosphere and contaminate the surrounding land and air." *Id.*

2. Petitioners are farmers and fishermen who live near the plant, a trade union of fishworkers, and a local government entity. *See* Pet. App. 2a. In 2015, they sued the IFC in the U.S. District Court for the District of Columbia, where it is domiciled, *id.* 3a. Petitioners brought claims "for negligence, negligent supervision, public nuisance, private nuisance, trespass, and breach of contract." *Id.* 28a. They sought "injunctive relief running against [the] IFC or, in the alternative, compensatory and punitive damages." *Id.*

The IFC's Articles of Agreement—its founding treaty—contain an express waiver of immunity. Under that provision, "[a]ctions may be brought against the Corporation . . . in a court of competent jurisdiction in the territories of a member in which the Corporation has an office." IFC Articles of Agreement art. VI, § 3, Dec. 5, 1955, 7 U.S.T. 2197, 2214;[2] *see also* 22 U.S.C. § 282g (giving this provision of the IFC Articles of Agreement "full force and effect in the United States"). There is only one exception:

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[2] The IFC Articles of Agreement, as amended through June 2012, are available at http://bit.ly/2bnPz4q.

Suits by *member states* are expressly prohibited. IFC Articles of Agreement, *supra*, art. VI, § 3.

Yet the IFC responded to petitioners' complaint by moving to dismiss based on absolute immunity, among other grounds. Pet. App. 28a. Petitioners responded that under the restrictive theory of sovereign immunity codified in the FSIA, *see* 28 U.S.C. § 1605(a)(2), the IFC is amenable to suit for commercial activities performed in the United States, including its financing of the Tata Mundra Plant. *See* Pet. App. 3a-5a. Petitioners also argued that the IFC had waived through its charter any immunity to which it might otherwise be entitled. *Id.* 4a, 7a.

The district court granted the IFC's motion, ruling "only" on its immunity argument. Pet. App. 28a, 38a. The district court noted that in *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998), the D.C. had Circuit held that the IOIA affords international organizations the degree of immunity that foreign governments enjoyed in 1945, when the IOIA was enacted. Pet. App. 30a. That form of immunity, the D.C. Circuit had concluded, was "virtually absolute immunity." *Id.* (quoting *Atkinson*, 156 F.3d at 1340). Accordingly, the district court held that the IFC is absolutely immune from suit. *Id.*

The district court also held, despite "the broad language of [the IFC's] waiver," Pet. App. 31a, that the IFC Articles of Agreement had not waived the IFC's immunity, *id.* 37a. Stressing that D.C. Circuit precedent required it "to read such waivers . . . narrowly," the district court explained that "[t]he relevant question is . . . 'whether a waiver of immunity to allow this type of suit, by this type of

plaintiff, would benefit the organization over the long term.'" *Id.* 31a-32a (quoting *Osseiran v. IFC*, 552 F.3d 836, 840 (D.C. Cir. 2009)). Petitioners argued that their suit falls into this category because the IFC requires the support of the local community before financing potentially harmful projects like the Tata Mundra Plant. *See id.* 35a. The IFC, petitioners continued, would not be able to "credibly assuage any doubts that local communities may harbor" about the impacts of future projects if its promises to prevent injury were unenforceable. *Id.* 36a. The district court acknowledged that this argument "makes some intuitive sense." *Id.* But it ultimately deemed the argument foreclosed by D.C. Circuit precedent. *Id.* 37a-38a.

3. A panel of the D.C. Circuit, which included two of the three judges who decided *Atkinson*, affirmed. The court of appeals declared that *Atkinson* "stands as an impassable barrier" to any argument that the IOIA should be construed consistently with the FSIA. Pet. App. 7a. Under *Atkinson*, "international organizations [a]re given complete immunity by the IOIA." *Id.* 6a.

The court of appeals also ruled that even though the IFC Articles of Agreement, "read literally, would seem to include a categorical waiver" of immunity from suit, the IFC had not waived its immunity. Pet. App. 7a-11a. The D.C. Circuit acknowledged that "it is a bit strange" that its precedent requires courts to ask "when a claim 'benefits' the international organization." *Id.* 8a (citing *Osseiran*, 552 F.3d at 840). But, being "obliged to apply" that test, the court of appeals found the benefits of this suit would be outweighed by the burdens. *Id.* 10a-11a.

Judge Pillard wrote separately to express her opinion that *Atkinson* was "wrongly decided" and should be abrogated. Pet. App. 12a (Pillard, J., concurring). Noting that the Third Circuit has expressly rejected *Atkinson*, Judge Pillard maintained that were she "not bound by *Atkinson*, [she too] would hold that international organizations' immunity under the IOIA is the same as the immunity enjoyed by foreign states." *Id.* 16a (citing *OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 762-64 (3d Cir. 2010)). "When a statute incorporates existing law by reference"—as the IOIA does—"the incorporation is generally treated as dynamic, not static." *Id.* 12a. And that canon, Judge Pillard concluded, "makes sense" here. *Id.* 16a. "Neither the IOIA nor [the D.C. Circuit's] cases interpreting it explain why nations that collectively breach contracts or otherwise act unlawfully through organizations should enjoy immunity in our courts when the same conduct would not be immunized if directly committed by a nation acting on its own." *Id.*

Judge Pillard added that the D.C. Circuit's waiver case law has "compounded" *Atkinson*'s error. Pet. 16a. Directing that courts "pare back an international organization's apparent waiver of immunity," according to the "amorphous" question whether a particular lawsuit would "benefit" an international organization, creates a "doctrinal tangle." Pet. App. 16a-17a, 21a. It would be far better, Judge Pillard proposed, to determine waiver issues according to organizations' own charters and the "time-tested body of law under the FSIA" that allows lawsuits based on commercial activity. *Id.* 21a.

4. Petitioners sought rehearing en banc, but the court of appeals denied the petition without comment. Pet. App. 39a.

REASONS FOR GRANTING THE WRIT

The International Organizations Immunities Act grants international organizations "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). This statute gives rise to two important questions. First, does the "same immunity . . . as is enjoyed" language incorporate immunity standards as they currently exist under the Foreign Sovereign Immunities Act, or does it continue to give international organizations the now-anachronistic immunity to which foreign governments were entitled in 1945? Second, if the statute does the latter, what rules govern the immunity to which international organizations are entitled? The Court should use this case to consider both these pressing questions.

I. This Court should resolve whether the IOIA cloaks international organizations with greater immunity than the FSIA affords to foreign states.

A. There is an entrenched circuit split over this issue.

1. The Third Circuit has held that "[w]ell-established rules of statutory interpretation demonstrate" that the IOIA confers no more immunity on international organizations than the FSIA affords to foreign states. *OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 762-63 (3d Cir. 2010). In particular, the Third Circuit has explained that the plain language of the IOIA's "same

immunity" language triggers the "Reference Canon." *Id.* at 762-63. Under that canon, "[a] statute which refers to a subject generally adopts the law on the subject as of the time the law is enacted. ***This will include all the amendments and modifications of the law subsequent to the time the reference statute was enacted.***" *Id.* at 763 (emphasis in original) (quotation marks and citation omitted). Applying that canon here, the IOIA tracks the FSIA. *Id.* at 763-64.[3]

"The considered view of the Department of State" is likewise that "the immunity of international organizations under the IOIA was not frozen as of 1945, but follows developments in the law of foreign sovereign immunity under the FSIA." Pet. App. 15a (Pillard, J., concurring); *see also OSS Nokalva*, 617 F.3d at 763-64. The State Department Legal Advisor has explained: "By virtue of the FSIA, . . . international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities . . . ." Letter from Roberts B. Owen, Legal Adviser, Dep't of State, to Leroy D. Clark, Gen. Counsel, EEOC (June 24, 1980), *in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917, 918 (1980).[4] Furthermore, the United

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[3] Before the D.C. Circuit's decision in *Atkinson*, the United States District Court for the District of Columbia also concluded that "the plain language of the International Organizations Immunities Act incorporates the terms of the Foreign Sovereign Immunities Act." *Rendall-Speranza v. Nassim*, 932 F. Supp. 19, 23 (D.D.C. 1996) (capitalization altered). But *Atkinson* abrogated this decision. *See* 156 F.3d at 1341 n.6.

[4] The State Department has similarly explained that the United States typically "afford[s] restrictive immunity" to

States has explained in a brief to the D.C. Circuit that the "express language and the statutory purposes underlying the [IOIA] bring international organizations within the terms of the [FSIA]," characterizing the contrary view as "devoid of substance." Brief for the United States as Amicus Curiae at 8-9, *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465), *available at* 3 D.C. Cir. J.A. 1056-75 [hereinafter U.S. *Broadbent* Brief]; *see also Broadbent*, 628 F.2d at 31 (acknowledging this view).

"Although the State Department's interpretation of the IOIA is not binding on [courts], the Department's involvement in the drafting of the IOIA lends its view extra weight." Pet. App. 15a (Pillard, J., concurring).

2. In direct contrast, the D.C. Circuit reaffirmed its view here that the IOIA cloaks international organizations with "the immunity of foreign organizations in 1945." Pet. App. 6a (citing *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998)). In *Atkinson*, the D.C. Circuit opined that "the text of the IOIA unfortunately provides no express guidance on whether Congress intended to incorporate in the IOIA subsequent changes to the law governing the immunity of foreign sovereigns." 156 F.3d at 1341. The D.C. Circuit therefore turned to another provision of the Act giving the President the authority to modify or revoke any of the privileges

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international organizations. *See* Letter from Acting Secretary of State Arnold Kanter to President George H.W. Bush (Sept. 21, 1992), *in* 1 Digest of United States Practice in International Law, 1991-1999, at 1016 (Sally J. Cummins & David P. Stewart eds., 2005), http://bit.ly/2EKesoE.

or immunities of any particular organization, *see* 22 U.S.C. § 288, and to the IOIA's legislative history. And from those sources, the D.C. Circuit surmised that "Congress' intent was to adopt the body of law only as it existed in 1945," under which the D.C. Circuit believed "immunity of foreign sovereigns was absolute." *Atkinson*, 156 F.3d at 1341.

Expressly acknowledging the conflict between the Third and D.C. Circuits, the Supreme Court of Alaska has also taken the D.C. Circuit's position, holding that "[t]he IOIA provides absolute immunity to international organizations." *Price v. Unisea, Inc.*, 289 P.3d 914, 920 (Alaska 2012). In addition, district courts in three circuits outside of the Third and D.C. Circuits have adopted the D.C. Circuit's holding in *Atkinson*. *See Enterasys Networks, Inc. v. Mexmal Mayorista, S.A. de C.V. (In re Dinastia, L.P.)*, 381 B.R. 512, 519-20 (S.D. Tex. 2007); *Banco de Seguros del Estado v. IFC*, Nos. 06 Civ. 2427(LAP) & 06 Civ. 3739(LAP), 2007 WL 2746808, at *3-4 (S.D.N.Y. Sept. 20, 2007); *Ashford Int'l, Inc. v. World Bank Grp.*, No. 1:04-CV-3822-JOF, 2006 WL 783357, at *2-3 (N.D. Ga. Mar. 24, 2006).

3. This conflict will not abate without this Court's intervention. The Third Circuit's *OSS Nokalva* decision rejecting the D.C. Circuit's position came from a unanimous panel (Sloviter, Barry, and Hardiman, JJ.) and is reinforced by the longstanding view of the State Department. There is no reason to think the Third Circuit will reconsider that ruling.

The D.C. Circuit is equally resolute in its contrary view. Before this case, it made clear that *Atkinson* "remains vigorous as Circuit law." Pet. App. 5a (quoting *Nyambal v. IMF*, 772 F.3d 277, 281 (D.C.

Cir. 2014), *cert. denied*, 135 S. Ct. 2587 (2015)).[5] Judge Pillard urged the court here to "revisit" that rule. Pet. App. 21a (Pillard, J., concurring). But the court, as it had done before, denied rehearing en banc without comment. *Id.* 39a; *see also Sampaio v. Inter-Am. Dev. Bank*, 468 Fed. Appx. 10 (D.C. Cir. 2012) (noting denial of rehearing en banc). The Supreme Court of Alaska similarly appears locked into its position: *Price* was a unanimous decision, and it has not been questioned by any subsequent opinion.

B. The D.C. Circuit's rule that international organizations have greater immunity than the FSIA allows is incorrect.

The D.C. Circuit's holding that the IOIA confers immunity according to the law of 1945 is wrong across every dimension.

1. *Text.* As the Third Circuit recognizes, the plain text of the IOIA incorporates the FSIA. *See OSS Nokalva*, 617 F.3d at 763. The IOIA entitles international organizations to the "same immunity from suit . . . as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). Foreign governments are entitled to immunity only under the terms of the FSIA. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). Under ordinary usage and the reference canon, that means international organizations are entitled to that "same immunity."

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[5] Although the petition for certiorari in *Nyambal* raised the question presented here, that case was a poor vehicle for resolving the issue. The defendant's articles of agreement gave it unqualified immunity from suit, "broader than the protection afforded by the IOIA's aegis alone." *Nyambal*, 772 F.3d at 281. So the defendant was entitled to immunity regardless of the scope of the IOIA. *See id.* Such is not the case here.

This conclusion is also compelled by the particular context in which the IOIA operates. The IOIA is a jurisdictional provision. *See Zuza v. Office of the High Representative*, 107 F. Supp. 3d 90, 93 (D.D.C. 2015). And where, as here, a jurisdictional provision is "expressed in the present tense," its "plain text" requires applying the law as of the time of suit. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003). Furthermore, sovereign immunity has always been determined according to "current political realities." *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004).

The D.C. Circuit brushed all this aside, focusing instead on another IOIA provision that gives the President the "authority to modify, condition, limit, and even revoke" the privileges or immunities of a designated organization. *Atkinson*, 156 F.3d at 1341 (citing 22 U.S.C. § 288). The D.C. Circuit has taken this provision as evidence that Congress intended post-1945 changes in immunity from suit to come only from the Executive, not from subsequent legislation. *See id.* But as Judge Pillard explained below, that provision "merely empowers the President to make organization- and function-specific exemptions from otherwise-applicable immunity rules." Pet. App. 13a (Pillard, J., concurring); *accord OSS Nokalva*, 617 F.3d at 763. It does not establish those otherwise-applicable immunity rules; that is what Section 288a(b) does.

2. *Drafting history.* The drafting history of the IOIA confirms what the plain text indicates. The original House version of the Act provided international organizations "immunity from suit and every form of judicial process." H.R. 4489, 79th Cong.

§ 2(b) (1945). The Senate, however, rejected this phrasing. While retaining absolute immunity language with respect to "the *property* of international organizations," the Senate curbed the immunity-from-suit provision so that, as enacted, it provides merely the "same immunity . . . as is enjoyed by foreign governments." Pet. App. 14a-15a (Pillard, J., concurring) (alteration in original) (emphasis added) (citation omitted). A court may not "read back into the Act the very . . . 'statutory language that [Congress] ha[d] earlier discarded in favor of other language.'" *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (citation omitted).

The D.C. Circuit's *Atkinson* decision overlooked this problem. Instead, the court fixated on a sentence of legislative history stating that the President retained the authority to adjust the immunity a designated organization enjoys if it "engage[d], for example, in activities of a commercial nature." 156 F.3d at 1341 (quoting S. Rep. No. 79-861, at 2 (1945)). From this the court concluded that the 1945 Congress had already "taken into account" the "concerns that motivated the State Department to adopt the restrictive immunity approach to foreign sovereigns in 1952" by giving the role of modifying immunity to the President. *Id.* But this single sentence of legislative history can hardly overcome the plain text of the IOIA. At any rate, the sentence offers no meaningful support to the D.C. Circuit's view. As noted just above, the President's power is to make organization-specific exceptions to immunity, not to change the default immunity rules.

Lest there be any doubt, Congress itself has since read the IOIA to provide only restrictive immunity.

Years after the United States adopted the restrictive theory, a congressional report confirmed that "international organizations . . . generally have the same immunity as foreign governments, and the [FSIA] provides that foreign governments are not immune for actions taken in connection with their commercial activities." H.R. Rep. No. 105-802, at 13 (1998) (citation omitted) (explaining the impact of an amendment to the Foreign Corrupt Practices Act).

3. *Consequences.* The D.C. Circuit's absolute immunity rule also produces "an anomalous result," *OSS Nokalva*, 617 F.3d at 764. As just noted, foreign states involved in commercial activities are subject to suits in this country based on those activities. *See* 28 U.S.C. § 1605(a)(2). Yet under the D.C. Circuit's rule, "a group of states acting through an international organization is entitled to broader immunity than its member states enjoy when acting alone." *OSS Nokalva*, 617 F.3d at 764; *see also* Pet. App. 16a (Pillard, J., concurring). As the United States has explained, there is "no reason" for this incongruity. U.S. *Broadbent* Brief, *supra*, at 10. Worse yet, the rule "may create an incentive for foreign governments to evade legal obligations by acting through international organizations." *OSS Nokalva*, 617 F.3d at 764.

The D.C. Circuit has never answered this argument. At the very least, therefore, its counterintuitive and potentially subversive absolute immunity rule demands review by this Court.

C. This Court should resolve this important issue here and now.

1. The question whether the IOIA incorporates the restrictive theory of immunity codified in the

FSIA is a recurring issue. It has been embedded in D.C. Circuit cases in recent years involving claims ranging from bankruptcy, *see Kaiser Grp. Int'l, Inc. v. World Bank*, 420 Fed. Appx. 2 (D.C. Cir. 2011), to race discrimination in employment, *see Smith v. World Bank Grp.*, 694 Fed. Appx. 1 (D.C. Cir. 2017). Other decisions include *Sampaio*, 468 Fed. Appx. 10; *Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co.*, 264 Fed. Appx. 13 (D.C. Cir. 2008); *Aguado v. Inter-Am. Dev. Bank*, 85 Fed. Appx. 776 (D.C. Cir. 2004); *Dujardin v. Int'l Bank for Reconstruction & Dev.*, 9 Fed. Appx. 19 (D.C. Cir. 2001); *Fazzari v. Inter-Am. Dev. Bank*, 254 F.3d 315 (D.C. Cir. 2000); *Hudes v. Aetna Life Ins. Co.*, 806 F. Supp. 2d 180, 187-89 (D.D.C. 2011), *aff'd per curiam*, 493 Fed. Appx. 107 (D.C. Cir. 2012); *Polak v. IMF*, 657 F. Supp. 2d 116, 120-21 (D.D.C. 2009), *appeal dismissed*, No. 09-7114, 2010 WL 4340534 (D.C. Cir. 2010). The question presented also regularly arises in other courts. *See supra* at 14 (citing cases from the past decade adjudicated in federal or state courts in Alaska, Georgia, New Jersey, New York, and Texas).

2. The question presented also has significant implications for individuals and international organizations alike. Individuals and companies doing business with international organizations have a strong interest in holding such organizations to their commercial and other private-law obligations. The same is true of others directly affected by the actions of such organizations. Insofar as the D.C. Circuit's absolute immunity rule is mistakenly impeding such legal accountability, this Court should reject that rule.

On the other hand, when the IOIA provides immunity, it provides protection from "every form of judicial process," 22 U.S.C. § 288a(b), no matter how preliminary or "unobtrusive," *Atkinson*, 156 F.3d at 1339. Accordingly, if the D.C. Circuit's absolute immunity rule is correct, then international organizations should be promptly relieved of the obligation to defend themselves in the Third Circuit, as well as in other courts where the question presented is unresolved.

3. The question whether the IOIA incorporates the restrictive theory of immunity codified in the FSIA is outcome-determinative here. The FSIA denies immunity where a lawsuit is based on "commercial activity" in the United States or on an act performed in the United States in connection with commercial activity elsewhere. 28 U.S.C. § 1605(a)(2); *see also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). The IFC has not disputed that its activities at issue here meet this test. Nor could it. Loaning money at market-based interest rates to a private entity, to build a private enterprise, is quintessentially commercial activity. *See* Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 Suffolk Transnat'l L. Rev. 471, 529 (2008) ("banking transactions" constitute commercial activity for FSIA purposes). And the IFC made these loan decisions, as well as at least some subsequent supervisory choices, in the United States. Accordingly, if the IOIA tracks the FSIA, then the IFC is not entitled to immunity and the D.C. Circuit's judgment must be reversed.

II. If the IOIA confers greater immunity than the FSIA allows, this Court should settle the basic rules governing that immunity.

Even if the D.C. Circuit were correct that the IOIA entitles international organizations to immunity according to the rules that prevailed in 1945, this Court's intervention would still be warranted. This is so for two reasons. First, contrary to the D.C. Circuit's position, the law in 1945 did not afford absolute immunity to foreign governments. Second, the D.C. Circuit's test for determining whether an organization has waived its immunity is misguided. At the very least, the meaning of the IOIA is too important to be left to D.C. Circuit precedent that—as even members of that court endorsing the precedent concede—"is a bit strange" even on its own terms and requires demoting several decisions of this Court to mere "dicta." *See* Pet. App. 6a, 8a.

A. The D.C. Circuit's "absolute immunity" rule is mistaken.

1. This Court has repeatedly explained that as of 1945, sovereign immunity was not absolute. Instead, courts "'consistently . . . deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction' over particular actions against foreign sovereigns." *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004) (alteration in original) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)); *see also Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1328 (2016). Accordingly, courts in 1945 would confer immunity if the State Department requested it. *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010).

But if the Executive Branch remained silent, a court would "decide for itself" whether the immunity a foreign state sought was "one which it is the established policy of the [State Department] to recognize." *Samantar*, 560 U.S. at 311-12 (alteration in original) (first quoting *Ex parte Republic of Peru*, 318 U.S. 578, 587 (1943); then quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945)). Courts would not "allow an immunity on new grounds which the government has not seen fit to recognize." *Bank Markazi*, 136 S. Ct. at 1328 (quoting *Hoffman*, 324 U.S. at 35). Indeed, less than a year *before* the IOIA was enacted, this Court in *Hoffman* denied immunity to Mexico because the State Department did not request it and no established ground supported it. 324 U.S. at 38.

Applying this framework leads to a straightforward conclusion: Even if the IOIA requires courts today to follow the immunity rules of 1945, courts should still not confer immunity upon international organizations where, as here, the FSIA would deny it and the Executive Branch has not asked for it. The "official policy of our Government"—reflected in the FSIA and, before that, in the 1952 Tate Letter—is the "restrictive theory" of sovereign immunity. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698, 703 (1976) (opinion of White, J.). And even more specifically, the State Department's view is that international organizations are not entitled to more immunity than the FSIA confers. *See supra* at 12-13 (setting forth the State Department's position). A court applying 1945 immunity law must "defer" to that political branch policy. *Cf. Altmann*, 541 U.S. at 696 (deferring to congressional judgment embodied in the FSIA).

2. The D.C. Circuit has rejected this logic on the ground that this Court's consistent description—beginning in 1943 and as recently as 2016—of the immunity rules that prevailed in 1945 has been mere "dicta." Pet. App. 6a. According to the D.C. Circuit, the law at that time instead bestowed "absolute immunity" on foreign governments—without ever expressly saying so. *Id.* 4a, 6a; *see also Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998).

This Court's statements respecting deference to the political branches, however, are not dicta. *Altmann* held the FSIA applies to pre-FSIA conduct partly *because* courts have long "deferred to the [immunity] decisions of the political branches." 541 U.S. at 689, 696 (quoting *Verlinden*, 461 U.S. at 486). And this Court deemed the pre-1945 rule that courts would not allow immunity the government had not recognized "[p]articularly pertinent" in *Bank Markazi*, 136 S. Ct. at 1328, and "controlling" in *Hoffman*, 324 U.S. at 38. *See also OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 762 n.4 (3d Cir. 2010) (noting that "considerable evidence" supports the conclusion that this Court's rule in 1945 was deference to the political branches, not absolute immunity).

Hedging its bets, the D.C. Circuit also suggested here that "virtually absolute" immunity existed in 1945 at least as "a matter of practice" because the State Department requested immunity back then "whenever a foreign sovereign was sued." Pet. App. 6a. But this assertion, too, is incorrect. In addition to the *Hoffman* case discussed above, the State Department either denied or declined to

suggest immunity in numerous pre-1945 cases, *see, e.g.*, *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 71 (1938); *Lamont v. Travelers Ins. Co.*, 24 N.E.2d 81, 86 (N.Y. 1939), including some involving commercial activity, *see, e.g.*, *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 200, 203 (S.D.N.Y. 1929); *The Pesaro*, 277 F. 473, 479 n.3 (S.D.N.Y. 1921). And where the State Department did not suggest immunity, courts denied it. *See, e.g.*, *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d at 200, 203; *Ulen & Co. v. Bank Gospodarstwa Krajowego*, 24 N.Y.S.2d 201, 204, 206 (App. Div. 1940).

B. The D.C. Circuit's test for finding a waiver of immunity distorts the plain language of governing law.

The IOIA makes clear that international organizations "may expressly waive their immunity." 22 U.S.C. § 288a(b). Yet the D.C. Circuit's doctrine for assessing such waivers "lacks a sound legal foundation and is awkward to apply." Pet. App. 17a (Pillard, J., concurring). That doctrine, too, warrants this Court's review.

1. Analyzing under the IOIA whether an international organization has waived immunity to suit should be an uncomplicated task. All such organizations have founding agreements that reflect the judgment of the participating states—including the United States—as to the level of privileges and immunities necessary for the organization to carry out its particular functions. The IFC Articles of Agreement, like those of many other international organizations, state that except for suits by member states, "[a]ctions may be brought against the

Corporation." IFC Articles of Agreement, *supra*, art. VI, § 3. Where, as here, the plain terms of those documents waive immunity, those express waivers should be honored. *Cf., e.g., United States v. Yellow Cab Co.*, 340 U.S. 543, 547 & n.4 (1951) (explaining that the Federal Tort Claims Act, which gave district courts jurisdiction (subject to certain exceptions not pertinent here) to hear "any [tort] claim against the United States," "waive[d] the Government's immunity from suit in sweeping language" (quoting ch. 753, tit. IV, § 410(a), 60 Stat. 812, 844) (1946)).

The D.C. Circuit acknowledged that "read literally," the IFC's waiver provision "would seem to include a categorical waiver" of immunity. Pet. App. 7a. And that is how the State Department read identical language in the World Bank's Articles of Agreement when it was established. *See* Articles of Agreement of the International Bank for Reconstruction and Development art. VII, § 3, Dec. 27, 1945, 60 Stat. 1440, 1457-58. "[T]he Bank," the State Department explained, "will be subject to a suit." U.S. Dep't of State, *Constitutionality of the Bretton Woods Agreement Act* 90 (1945), http://bit.ly/2Dm0qwe. But instead of enforcing the text of the charter according to its plain terms, the D.C. Circuit has read the IOIA's waiver provision to insert "a qualifier into it." *Osseiran v. IFC*, 552 F.3d 836, 839 (D.C. Cir. 2009). The D.C. Circuit insists that under the IOIA, an international organization's express waiver of immunity "allow[s] only the type of suit by the type of plaintiff that 'would benefit the organization over the long term.'" Pet. App. 7a (emphasis omitted) (quoting *Osseiran*, 552 F.3d at 840); *see also Atkinson*, 156 F.3d at 1338.

The IOIA provides no license to engage in such picking and choosing. Its provision allowing international organizations to "expressly waive their immunity," 22 U.S.C. § 288a(b), contains no qualifier directing courts to assess whether an international organization will "benefit" in any given case from waiver of immunity from suit. Therefore, an organization's express, categorical waiver in its charter should be the end of the matter. At any rate, organizations' assessments of costs and benefits "are more reliably reflected in their charters and policies—here, in the broad waiver included in the IFC's Articles of Agreement—than in their litigation positions defending against pending claims." Pet. App. 19a (Pillard, J., concurring).

2. The D.C. Circuit's practice in applying its revisionist waiver test highlights the test's impropriety. The test assumes that an international organization's long-term goals are served by being amenable to suit based on commercial activity only when the party suing it "would not [have] enter[ed] into negotiations or contract with the organization absent waiver." Pet. App. 9a.

But, as Judge Pillard explained below, "the opposite would make more sense." Pet. App. 19a (Pillard, J., concurring). "Entities doing regular business with international organizations can write waivers of immunity into their contracts with the organizations." *Id.*; *see also OSS Nokalva*, 617 F.3d at 759 (referencing a contract clause allowing a software developer to sue an international organization). So perhaps the absence of a waiver of immunity in a contract negotiated by sophisticated parties might indicate something about the parties' intent. By

contrast, local people who "lack[] any bargaining opportunity" to obtain similar concessions—even regarding risky projects like this one—have no comparable protection. Pet. App. 20a (Pillard, J., concurring). All they have is the IOIA and its commitment to honor waivers of immunity in organizations' charters. Therefore, when such people bring suits against international organizations, the only way the organizations can demonstrate they are willing to be kept to their promises (and thereby benefit themselves in the long run) is to subject themselves to suit—at least insofar as foreign states would be subject to suit under the FSIA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 6, 2017 Decided June 23, 2017

No. 16-7051

BUDHA ISMAIL JAM, ET AL.,
APPELLANTS

v.

INTERNATIONAL FINANCE CORPORATION,
APPELLEE

Appeal from United States District Court
for the District of Columbia
(No. 1:15-cv-00612)

Richard L. Herz argued the cause for appellants. With him on the briefs were *Marco B. Simons* and *Michelle C. Harrison.*

Deepak Gupta was on the brief for *amicus curiae* Daniel Bradlow in support of appellants.

Jennifer Green was on the brief for *amicus curiae* Dr. Erica Gould in support of appellants.

Francis A. Vasquez, Jr. argued the cause for appellee. With him on the brief was *Maxwell J. Hyman.*

Jeffrey T. Green and *Sena N. Munasifi* were on the brief for *amicus curiae* The International Bank for Reconstruction and Development, et al. in support of appellee.

Before: PILLARD, *Circuit Judge*, and EDWARDS and SILBERMAN, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Circuit Judge* SILBERMAN.

Concurring opinion filed by *Circuit Judge* PILLARD.

SILBERMAN, *Senior Circuit Judge*: Appellants, a group of Indian nationals, challenge a district court decision dismissing their complaint against the International Finance Corporation (IFC) on grounds that the IFC is immune from their suit. The IFC provided loans needed for construction of the Tata Mundra Power Plant in Gujarat, India. Appellants who live near the plant alleged—which the IFC does not deny—that contrary to provisions of the loan agreement, the plant caused damage to the surrounding communities. They wish to hold the IFC financially responsible for their injuries, but we agree with the well-reasoned district court opinion that the IFC is immune to this suit under the International Organizations Immunities Act, and did not waive immunity for this suit in its Articles of Agreement.

I.

Appellants are fishermen, farmers, a local government entity, and a trade union of fishworkers. They assert that their way of life has been devastated by the power plant.[1]

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[1] Appellants' complaint paints a dismal picture. For example, the plant's cooling system discharges thermal pollution into the sea, killing off marine life on which fishermen rely for their income. Saltwater intrusion into the groundwater—a result of the plant's construction—means that farmers can no longer use that water for irrigation. (In fact, the villagers must purchase elsewhere freshwater necessary for consumption.) And because

The IFC, headquartered in Washington, is an international organization founded in 1956 with over 180 member countries. It provides loans in the developing world to projects that cannot command private capital. IFC Articles, art. III §3(i), Dec. 5, 1955, 7 U.S.T. 2197, 264 U.N.T.S. 117. The IFC loaned $450 million to Coastal Gujarat Power Limited, a subsidiary of Tata Power, an Indian company, for construction and operation of the Tata Mundra Plant. The loan agreement, in accordance with IFC's policy to prevent social and environmental damage, included an Environmental and Social Action Plan designed to protect the surrounding communities. The loan's recipient was responsible for complying with the agreement, but the IFC retained supervisory authority and could revoke financial support for the project.

Unfortunately, according to the IFC's own internal audit conducted by its ombudsman, the plant's construction and operation did not comply with the Plan. And the IFC was criticized by the ombudsman for inadequate supervision of the project. Yet the IFC did not take any steps to force the loan recipients into compliance with the Plan.

The appellants' claims are almost entirely based on tort: negligence, negligent nuisance, and trespass. They do, however, raise a related claim as alleged third party contract beneficiaries of the social and environmental terms of the contract. According to appellants, the IFC is not immune to these claims,

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the plant is coal-powered, coal must be transported from nine miles away on an open-air conveyor system. During that relocation, coal dust and ash disperse into the atmosphere and contaminate the surrounding land and air.

and, even if it was statutorily entitled to immunity, it has waived immunity.

II.

Appellants are swimming upriver; both of their arguments run counter to our long-held precedent concerning the scope of international organization immunity and charter-document immunity waivers.

The IFC relies on the International Organizations Immunities Act (IOIA), which provides that international organizations "shall enjoy the same immunity from suit . . . as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. § 288a(b). The President determines whether an organization is entitled to such immunity. 22 U.S.C. § 288. The IFC has been designated an international organization entitled to the "privileges, exemptions, and immunities" conferred by the statute. Exec. Order No. 10,680, 21 Fed. Reg. 7,647 (Oct. 5, 1956).

In response to the IFC's claim of statutory entitlement under the IOIA, appellants rather boldly assert that *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998), our leading case on the immunity of international organizations under that statute, should not be followed. *Atkinson* held that foreign organizations receive the immunity that foreign governments enjoyed at the time the IOIA was passed, which was "virtually absolute immunity." *Id.* at 1340 (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983)). And that immunity is not diminished even if the immunity of foreign

governments has been subsequently modified, particularly by the widespread acceptance and codification of a "commercial activities exception" to sovereign immunity. *E.g.*, 28 U.S.C. § 1605(a)(2).

Attacking *Atkinson*, appellants make two related contentions. First, *Atkinson* was wrong to conclude that when Congress tied the immunity of international organizations to foreign sovereigns, it meant the immunity foreign sovereigns enjoyed in 1945. Instead, according to appellants, who echo the arguments pressed in *Atkinson* itself, lawmakers intended the immunity of the organizations to rise or fall—like two boats tied together—with the scope of the sovereigns' immunity. In other words, even assuming foreign sovereigns enjoyed absolute immunity in 1945, if that immunity diminished, as it has with the codification of the commercial activity exception, Congress intended that international organizations fare no better.

The problem with this argument—even if we thought it meritorious, which we do not—is that it runs counter to *Atkinson*'s holding, which explicitly rejected such an evolving notion of international organization immunity. *See* 156 F.3d at 1341. We noted that Congress anticipated the possibility of a change to immunity of international organizations, but explicitly delegated the responsibility to the President to effect that change—not the judiciary. *Id.* Morever [sic], when considering the legislation, Congress rejected a commercial activities exception—which is exactly the evolutionary step appellants wish to have us adopt. *Id.* As the district court recognized, we recently reaffirmed *Atkinson*, saying that the case "remains vigorous as Circuit law." *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 281 (D.C. Cir. 2014).

Recognizing that a frontal attack on *Atkinson*'s holding would require an en banc decision, appellants next argued that we can, and should, bypass its precedential impact because the Supreme Court has undermined its premise—that in 1945 the immunity of foreign sovereigns was absolute (or virtually absolute).

To be sure, the Court has said in dicta that in 1945, courts "'consistently . . . deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction' over particular actions against foreign sovereigns . . . ." *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004) (quoting *Verlinden*, 461 U.S. at 486). But as a matter of practice, at that time, whenever a foreign sovereign was sued, the State Department did request sovereign immunity. *Id.* The only arguable exception involved a lawsuit in rem against a ship owned but not possessed by Mexico; it was not a suit against Mexico. *See Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945). And, even if appellants are correct that the executive branch played an important role in immunity determinations in 1945, that does not diminish the absolute nature of the immunity those sovereigns enjoyed; although Supreme Court dicta refers to the *mechanism* for conferring immunity on foreign sovereigns in 1945, Executive Branch intervention does not speak to the *scope* of that immunity.

In any event, the *holding* of *Atkinson*—regardless how one characterizes the immunity of foreign sovereigns in 1945—was that international organizations were given complete immunity by the IOIA unless it was waived or the President intervened. And as we noted, that holding was reaffirmed in *Nyambal after* the Supreme Court dicta on which

appellants primarily rely. Therefore, we conclude our precedent stands as an impassable barrier to appellants' first argument.

III.

That brings us to the waiver argument. There is no question that the IFC has waived immunity for some claims. Indeed, its charter, read literally, would seem to include a categorical waiver.[2] But our key case interpreting identical waiver language in the World Bank charter, *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983), read that language narrowly to allow only the *type of suit* by the *type of plaintiff* that "would benefit the organization over the long term," *Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 840 (D.C. Cir. 2009)

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[2] The Articles of Agreement contains the following provision, titled "Position of the Corporation with Regard to Judicial Process":

> Actions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Corporation shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Corporation.

IFC Articles, art. 6, § 3(vi). That provision carries "full force and effect in the United States" under the International Finance Corporation Act. 22 U.S.C. § 282g.

(citing *Atkinson*, 156 F.3d at 1338 and *Mendaro*, 717 F.2d at 618).[3]

To be sure, it is a bit strange that it is the judiciary that determines when a claim "benefits" the international organization; after all, the cases come to us when the organizations *deny* the claim, and one would think that the organization would be a better judge as to what claims benefit it than the judiciary. Perhaps that is why *Osseiran*, when applying *Mendaro*, refers to long-term goals, rather than immediate litigating tactics.

But whether or not the *Mendaro* test would be better described using a term different than "benefit," it is the *Mendaro* criteria we are obliged to apply. Ironically, the line of cases applying *Mendaro* ended up tying waiver to commercial transactions, so there is a superficial similarity to the commercial activities test that appellants would urge us to accept. But whatever the scope of the commercial activities exception to sovereign immunity, that standard is necessarily broader than the *Mendaro* test; if that exception applied to the IFC, the organization would *never* retain

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[3] Appellants argue that *Mendaro* impermissibly overruled our earlier case, *Lutcher S.A. Celulose e Papel v. Inter-American Development Bank*, 832 F.2d 454 (D.C. Cir. 1967), without an intervening Supreme Court or en banc decision. Appellants rely on dicta in *Lutcher*, but its holding was that the Inter-American Development Bank waived immunity to a breach of contract suit by a debtor. 382 F.2d at 456-68. *Mendaro* expressly considered the rationale of *Lutcher* and declined to extend its holding to the suit before it. 717 F.2d at 614-17. Indeed, the *Mendaro* test emerged in part from *Lutcher*'s discussion that the charter language at issue indicated waiver where "vulnerability to suit contributes to the effectiveness of the [organization's] operations." *Lutcher*, 382 F.2d at 456.

immunity since its operations are *solely* "commercial," i.e., the IFC does not undertake any "sovereign" activities.

The *Mendaro* test instead focused on identifying those transactions where the other party would not enter into negotiations or contract with the organization absent waiver. *See* 717 F.2d at 617 (inferring waiver only insofar as "necessary to enable the [organization] to fulfill its functions"). *Mendaro* provided examples: suits by debtors, creditors, bondholders, and "those other potential plaintiffs to whom the [organization] would have to subject itself to suit in order to achieve its chartered objectives." *Id.* at 615.

We have stretched that concept to include a claim of promissory estoppel, *see Osseiran*, 552 F.3d at 840-41, and a quasi-contract claim of unjust enrichment, *see Vila v. Inter-Am. Invest. Corp.*, 570 F.3d 274, 278-80 (D.C. Cir. 2009). But all the claims we have accepted have grown out of business relations with outside companies (or an outside individual engaged directly in negotiations with the organization).[4] *Compare Lutcher S.A. Celulose e Papel v. Inter-Am. Dev. Bank*, 382 F.2d 454 (D.C. Cir. 1967) (finding

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[4] Appellants do present a third party beneficiary claim, which, unlike their other claims, sounds in principles of contract law. We have previously found the distinction between contract and noncontract claims relevant. See *Vila* 570 F.3d at 280 n.3. But even if appellants qualified as third party beneficiaries, a point we do not address, they were not a necessary negotiating party. Accordingly, inferring waiver in this case stands at odds with the reasoning in *Mendaro*, i.e., that *Mendaro* implies waiver when the parties negotiated with the background of international organization immunity.

waiver in debtors' suit to enforce loan agreement) *with Mendaro*, 717 F.2d at 611 (rejecting employee sexual harassment and discrimination claim); *Atkinson*, 156 F.3d at 1336 (rejecting garnishment proceeding against organization employee).

Appellants attempt to define "benefit" more broadly. They argue that holding the IFC to the very environmental and social conditions it put in the contract, conditions which the IFC itself formulated, would benefit the IFC's goals. Even though appellants had no commercial relationship with the IFC (other than, allegedly, as third party beneficiaries of the loan agreement's requirements), they contend that the IFC will benefit from their lawsuit because they are attempting to hold the IFC to its stated mission and to its own compliance processes. They argue that obtaining "community support" is a required part of any IFC project, and suggest that communities will be unlikely to support IFC projects if the IFC is not amenable to suit. Appellants' ability to enforce the requirement that the IFC protect surrounding communities is as central to the IFC's mission as a commercial partner's ability to enforce the requirement that the IFC pay its electricity bill.

But *Mendaro* drew another distinction between claims that survive and those that don't. Those claims that implicate internal operations of an international organization are especially suspect because claims arising out of core operations, not ancillary business transactions, would threaten the policy discretion of the organization. *Accord Vila*, 570 F.3d at 286-89 (Williams, J., dissenting).

That notion applies here. Should appellants' suit be permitted, every loan the IFC makes to fund projects in developing countries could be the ect of a suit in Washington.[5] Appellee's suggestion that the floodgates would be open does not seem an exaggeration. Finally, if the IFC's internal compliance report were to be used to buttress a claim against the IFC, we would create a strong disincentive to international organizations using an internal review process. So even though appellants convince us that the term "benefit" is something of a misnomer—its claim in some sense can be thought of as a "benefit"—it fails the *Mendaro* test.

Accordingly, the district court decision is affirmed.

So ordered.

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[5] We need not reach appellee's alternative argument that this case may be dismissed under the doctrine of forum non conveniens.

PILLARD, *Circuit Judge, concurring*: I agree that *Atkinson* and *Mendaro*, which remain binding law in this circuit, control this case. I write separately to note that those decisions have left the law of international organizations' immunity in a perplexing state. I believe both cases were wrongly decided, and our circuit may wish to revisit them.

1. The International Organizations Immunities Act (IOIA), Pub L. No. 79-291, 59 Stat. 669 (1945) (codified at 22 U.S.C. § 288 *et seq.*), grants international organizations the same immunity "as is enjoyed by foreign governments." *Id.* § 2(b). When Congress enacted the IOIA in 1945, foreign states enjoyed "virtually absolute immunity," so long as the State Department requested immunity on their behalf. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). President Eisenhower designated the IFC as entitled to immunity under the IOIA in 1956. *See* Exec. Order No. 10,680, 21 Fed. Reg. 7,647 (Oct. 5, 1956). Congress and the courts have since recognized that foreign governments' immunity is more limited, as described by the Foreign Sovereign Immunities Act. 28 U.S.C. §§ 1604-05; *see Republic of Argentina v. Weltover*, 504 U.S. 607 (1992). We took a wrong turn in *Atkinson* when we read the IOIA to grant international organizations a static, absolute immunity that is, by now, not at all the same "as is enjoyed by foreign governments," but substantially broader.

When a statute incorporates existing law by reference, the incorporation is generally treated as dynamic, not static: As the incorporated law develops, its role in the referring statute keeps up. *Atkinson* itself correctly acknowledged that a "statute [that] refers to a subject generally adopts the law on the

subject," including "all the amendments and modifications of the law subsequent to the time the reference statute was enacted." *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998) (emphasis omitted); *see El Encanto, Inc. v. Hatch Chile Co.*, 825 F.3d 1161, 1164 (10th Cir. 2016).

The IOIA references foreign sovereign immunity, but in *Atkinson* we did not apply the familiar rule of dynamic incorporation because we thought another IOIA provision showed that Congress intended that reference to be static. Section 1 of the IOIA authorizes the President to "withhold or withdraw from any such [international] organization or its officers or employees any of the privileges, exemptions, and immunities provided for" by the IOIA. IOIA § 1. We read that language to mean that Congress intended the President alone to have the ability, going forward, to adjust international organizations' immunity from where it stood as of the IOIA's enactment in 1945. *Atkinson*, 156 F.3d at 1341. That presidential power was, we thought, exclusive of any shift in international organizations' immunity that might be wrought by developments in the law of foreign sovereign immunity to which the IOIA refers.

Correctly read, however, section 1 merely empowers the President to make organization- and function-specific exemptions from otherwise-applicable immunity rules. It says that the President may "withhold or withdraw from *any such organization*"—note the singular—"or *its* officers or employees any of the privileges, exemptions, and immunities" otherwise provided for by the IOIA. IOIA § 1 (emphasis added). Section 1 thus empowers the President to roll back an

international organization's immunity on an organization-specific basis. *See, e.g.*, Elizabeth R. Wilcox, *Digest of United States Practice in International Law* 405 (2009) (describing President Reagan's 1983 exercise of section 1 authority to withhold immunity from INTERPOL, followed by President Obama's 2009 restoration of the immunity after INTERPOL opened a liaison office in New York). Nothing about section 1 suggests that Congress framed or intended it to be the exclusive means by which an international organization's immunity might be determined to be less than absolute.

The inference we drew from section 1 in *Atkinson* seems particularly strained because it assumes that Congress chose an indirect and obscure route to freezing international organizations' immunity over a direct and obvious one. If Congress intended to grant international organizations an unchanging absolute immunity (subject only to presidential power to recognize organization-specific exceptions) it could have simply said so. It might have expressly tied international organizations' immunity to that enjoyed by foreign governments as of the date of enactment. Or, even better, it might have avoided cross-reference altogether by stating that international organizations' immunity is absolute. As it happens, the original House version of the IOIA did just that, providing international organizations "immunity from suit and every form of judicial process." H.R. 4489, 79th Cong. (as introduced, Oct. 24, 1945; referred to H. Comm. on Ways and Means), but the Senate rejected that as "a little too broad," 91 Cong. Rec. 12,531 (1945), even as it retained the absolute immunity language in provisions granting the property of international organizations

immunity from search, confiscation and taxation. *See* IOIA §§ 2(c), 6. In lieu of the House version's broad language, the Senate adopted the current formulation of section 2(b), which provides international organizations the "same immunity . . . as is enjoyed by foreign governments." H.R. 4489, 79th Cong. (as reported by S. Comm. on Finance, Dec. 18, 1945).

The considered view of the Department of State, harking back to before *Atkinson*, is that the immunity of international organizations under the IOIA was not frozen as of 1945, but follows developments in the law of foreign sovereign immunity under the FSIA. In a 1980 letter, then-Legal Adviser Roberts Owen opined that, by "virtue of the FSIA, . . . international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities." Letter from Roberts B. Owen, Legal Adviser, U.S. Department of State, to Leroy D. Clark, General Counsel, Equal Employment Opportunity Commission (June 24, 1980), *reprinted in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917, 917-18 (1980). Although the State Department's interpretation of the IOIA is not binding on the court, the Department's involvement in the drafting of the IOIA lends its view extra weight. *See* H.R. Rep. No. 79-1203, at 7 (1945) (referring to the draft bill as "prepared by the State Department"); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (citing a letter of the State Department's Legal Adviser and encouraging courts to "give serious weight to the Executive Branch's view" in cases that may affect foreign policy).

Reading the IOIA to dynamically link organizations' immunity to that of their member states makes sense. The contrary view we adopted in *Atkinson* appears to allow states, subject to suit under the commercial activity exception of the FSIA, to carry on commercial activities with immunity through international organizations. Thus, the Canadian government is subject to suit in United States courts for disputes arising from its commercial activities here, but the Great Lakes Fishery Commission—of which the United States and Canada are the sole members—is immune from suit under *Atkinson*. *See* Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962); *see also* Convention on Great Lakes Fisheries, Can.-U.S., Sept. 10, 1954, 6 U.S.T. 2836. Neither the IOIA nor our cases interpreting it explain why nations that collectively breach contracts or otherwise act unlawfully through organizations should enjoy immunity in our courts when the same conduct would not be immunized if directly committed by a nation acting on its own.

Were I not bound by *Atkinson*, I would hold that international organizations' immunity under the IOIA is the same as the immunity enjoyed by foreign states. *Accord OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 762-64 (3d Cir. 2010) (declining to follow *Atkinson* and holding that restricted immunity as codified in the FSIA, including its commercial activity exception, applies to international organizations under the IOIA).

2. *Atkinson*'s error is compounded in certain suits involving waiver under the *Mendaro* doctrine. In *Mendaro v. World Bank*, we decided that courts should pare back an international organization's apparent

waiver of immunity from suit whenever we believe the waiver would yield no "corresponding benefit" to the organization. 717 F.2d 610, 617 (D.C. Cir. 1983); *see Osserian v. Int'l Fin. Corp.*, 552 F.3d 836, 840 (D.C. Cir. 2009) (holding organization's facially broad waiver of immunity effective only as to types of plaintiffs and claims that "would benefit the organization over the long term"). That doctrine lacks a sound legal foundation and is awkward to apply; were I not bound by precedent, I would reject it.

It is undisputed that IOIA immunity may be waived, 22 U.S.C. § 288a(b), and the majority recognizes that the IFC's charter "would seem to include a categorical waiver." Maj. Op. 6-7 & n.2; *see* IFC Articles of Agreement art. 6, § 3, May 25, 1955, 7 U.S.T. 2197, 264 U.N.T.S. 118. Half a century ago, we read the Agreement establishing the Inter-American Development Bank (IADB) to effectuate a broad waiver of the Bank's immunity. *See Lutcher S. A. Celulose e Papel v. Inter-American Development Bank*, 382 F.2d 454, 457 (D.C. Cir. 1967) (Burger, J.). The IFC's Articles of Agreement, which use the same waiver language as did the IADB in *Lutcher*, would appear to waive the IFC's immunity here. Under the reasoning of *Lutcher*, the IFC, like the IADB in that case, may be sued in United States court.

But *Lutcher* was not our last word. As just noted, we decided in *Mendaro* to honor an international organization's "facially broad waiver of immunity" only insofar as doing so provided a "corresponding benefit" to the organization. 717 F.2d at 613, 617. We thought it appropriate to look to the "interrelationship between the functions" of the international organization and "the underlying purposes of international immunities"

to cabin a charter document's immunity waiver. *Id.* at 615. The member states, we opined in *Mendaro*, "could only have intended to waive the Bank's immunity from suits by its debtors, creditors, bondholders, and those other potential plaintiffs to whom the Bank would have to subject itself to suit in order to achieve its chartered objectives." *Id.* We decided the waiver did not apply to the claim of Mendaro, a former Bank employee challenging her termination, because recognizing employment claims had no "corresponding benefit" for the Bank. *Id.* at 612-14.

We saw *Mendaro* as distinguishable from *Lutcher*. Allowing the debtor's claims in *Lutcher* "would directly aid the Bank in attracting responsible borrowers," whereas complying with the law governing the Bank's "internal operations" in *Mendaro* would not "appreciably advance the Bank's ability to perform its functions." *Id.* at 618-20 (emphasis omitted). In other words, *Mendaro* assumes that business counterparties will be unwilling to transact with an international organization if they lack judicial recourse against it, but that making employees' legal rights unenforceable against such an organization will not affect their willingness to work there. We thus held that a facially broad waiver of an organization's immunity should be read not to allow employee claims.

The "corresponding benefit" doctrine calls on courts to second-guess international organizations' own waiver decisions and to treat a waiver as inapplicable unless it would bring the organization a "corresponding benefit"—presumably one offsetting the burden of amenability to suit. The majority acknowledges that "it is a bit strange" that *Mendaro* calls on the judiciary to re-determine an international

organization's own waiver calculus. Slip Op. at 8. I agree that the organization itself is in a better position than we are to know what is in its institutional interests. But, whereas my colleagues point to the fact that "the cases come to us when the organizations *deny* the claim," *id.*, I would be inclined to think that organizations' assessments of their own long-term goals are more reliably reflected in their charters and policies—here, in the broad waiver included in IFC's Articles of Agreement—than in their litigation positions defending against pending claims.

It is not entirely clear why we have drawn the particular line we have pursuant to *Mendaro*. Why are suits by a consultant, a potential investor, and a corporate borrower in an international organization's interest, but suits by employees and their dependents not? *Compare, e.g.*, *Vila v. Inter-American Investment, Corp.*, 570 F.3d 274, 276, 279-82 (D.C. Cir. 2009) (permitting suit by a consultant); *Osseiran*, 552 F.3d at 840-41 (permitting suit by a potential investor); *Lutcher*, 382 F.2d at 459-60 (permitting suit by a corporate borrower), *with, e.g.*, *Atkinson*, 156 F.3d at 1338-39 (barring suit by a former wife seeking garnishment of former husband's wages); *Mendaro*, 717 F.2d at 618-19 (barring suit by a terminated employee asserting a sex harassment and discrimination claim).

Our cases seem to construe charter-document immunity waivers to allow suits only by commercial parties likely to be repeat players, or by parties with substantial bargaining power. But the opposite would make more sense: Entities doing regular business with international organizations can write waivers of immunity into their contracts with the organizations.

See, e.g., *OSS Nokalva*, 617 F.3d at 759 (contract clause authorizing software developer to sue European Space Agency in state and federal courts in New Jersey). Sophisticated commercial actors that fail to bargain for such terms are surely less entitled to benefit from broad immunity waivers than victims of torts or takings who lacked any bargaining opportunity, or unsophisticated parties unlikely to anticipate and bargain around an immunity bar.

The IFC successfully argued here that it would enjoy no "corresponding benefit" from immunity waiver. The local entities and residents that brought this suit contend that giving effect here to the IFC's waiver would advance the Corporation's organizational goals. The "IFC requires 'broad community support' before funding projects" like the Tata Mundra power plant, and "local communities may hesitate to host a high-risk project," the appellants contend, "if they know that the IFC can ignore its own promises and standards and they will have no recourse." Appellants Br. at 48-49. Without directly addressing the benefits of legal accountability to the communities it seeks to serve, the IFC contends that treating the waiver in its Articles of Agreement as effective here would open a floodgate of litigation in United States courts. That argument has it backwards: The IFC persuaded the majority to stem a litigation flood it anticipates only because the immunity waiver in the IFC's own Articles of Agreement opened the gate.

The perceived need for *Mendaro*'s odd approach would not have arisen if we had, back in *Atkinson*, read the IOIA to confer on international organizations the same immunity as is enjoyed by foreign governments—*i.e.* restrictive immunity that, today,

would be governed by the FSIA. As the majority observes, Slip Op. at 8, the cases in which we have applied *Mendaro* to hold that claims are not immunity-barred look remarkably like cases that would be allowed to proceed under the FSIA's commercial activity exception. The activities we held to be non-immunized—such as suits by "debtors, creditors, [and] bondholders," *Mendaro*, 717 F.2d at 615, "suits based on commercial transactions with the outside world" affecting an organization's "ability to operate in the marketplace," *Osseiran*, 552 F.3d at 840, and unjust enrichment claims by commercial lending specialists, *Vila*, 570 F.3d at 276, 279-82—seem like just the kinds of claims that would be permitted under the commercial activity exception. We should have achieved that result, not via *Mendaro*'s "corresponding benefit" test, but by recognizing that the IOIA hitched the scope of international organizations' immunity to that of foreign governments under the FSIA. There is a time-tested body of law under the FSIA that delineates its contours—including its commercial activity exception. The pattern of decisions applying *Mendaro* may approximate some of the results that would have occurred had international organizations been subject to the FSIA, but *Mendaro* begs other important questions that assimilation of IOIA immunity to the FSIA would resolve.

Our efforts to chart a separate course under the IOIA were misguided from the start, and the doctrinal tangle has only deepened in light of the amorphous waiver-curbing doctrine that has developed under *Mendaro*. I believe that the full court should revisit both *Atkinson* and *Mendaro* in an appropriate case.

But because those decisions remain binding precedent in our circuit, I concur.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BUDHA ISMAIL JAM, et al., Plaintiffs, v. INTERNATIONAL FINANCE CORPORATION, Defendant.	Civil Action No. 15-612 (JDB)

MEMORANDUM OPINION

Located in a coastal region of Gujarat, India, the coal-fired Tata Mundra Power Plant was constructed in order to supply much-needed power for India's continued economic growth. But according to plaintiffs, who live, fish, and farm in the shadow of the Plant, its main legacy has been environmental and social harm—to the marine ecosystem, to the quality of the air, to plaintiffs' health, and to their way of life. Plaintiffs believe that the International Finance Corporation (IFC), which provided $450 million for construction of the Plant, is primarily responsible for their injuries. They have sued IFC in this Court seeking several forms of equitable relief or, in the alternative, compensatory and punitive damages. IFC now moves to dismiss on several grounds, most notably that it is immune from this suit under the International Organizations Immunities Act. Because the Court agrees that IFC is immune from this suit, it will

dismiss plaintiffs' complaint in its entirety, without reaching IFC's other arguments.

BACKGROUND

IFC is an international organization with 184 member countries, including the United States and India. Def.'s Mot. to Dismiss [ECF No. 10-1] at 3. As described in its Articles of Agreement, IFC's purpose is "to further economic development by encouraging the growth of productive private enterprise in member countries." Ex. 1 to Zeidan Decl. [ECF No. 10-8] (Articles of Agreement) Art. I. To fulfill that purpose, IFC may invest in privately run projects for which "sufficient capital is not available on reasonable terms." *Id.* The project at the center of this case, development of the Tata Mundra Power Plant, was carried out by Coastal Gujarat Power Limited (CGPL), a subsidiary of Tata Power, an Indian power company. IFC loaned CGPL $450 million for the development of the Plant. Total project cost was estimated to be $4.14 billion. Compl. [ECF No. 1] ¶¶ 56, 47.

Internal IFC policies demand careful attention to the environmental and social impacts of IFC-financed projects. IFC's "Performance Standards on Environmental and Social Sustainability" create a framework for the assessment, avoidance, minimization, and mitigation of environmental and social risks. *See* Ex. 5 to Herz Decl. [ECF No. 22-5] (2012 Performance Standards) at ¶¶ 1–8. "IFC will only finance investment activities that are expected to meet the requirements of the Performance Standards within a reasonable period of time." Ex. 2 to Herz Decl. [ECF No. 22-5] (2012 Policy on Environmental and Social Sustainability) ¶ 22. When IFC does invest in a

project, the resulting loan agreement requires the client to comply with the Performance Standards and other related policies. *See* 2012 Policy on Environmental and Social Sustainability ¶ 24. Thus, "managing environmental and social risks and impacts in a manner consistent with the Performance Standards [becomes] the responsibility of the client." *Id.* ¶ 7. But IFC retains responsibility for monitoring and supervising its clients' efforts. *Id.* "If the client fails to comply with its environmental and social commitments," then "IFC will work with the client to bring it back into compliance." *Id.* ¶ 24. "Persistent delays in meeting [those commitments] can lead to loss of financial support from IFC." *Id.* ¶ 22.

From the earliest stages of its involvement, IFC recognized that the development of the Plant entailed significant—and possibly irreversible—environmental and social risks. *See* Ex. 7 to Zeidan Decl. [ECF No. 10-14] (Compliance Advisory Ombudsman Assessment Report) at 4–5. Hence, before closing the deal on IFC's $450 million investment, IFC and CGPL developed an Environmental and Social Action Plan in an attempt to manage the risks they had identified. Compl. ¶¶ 49–51. Ultimately, the Action Plan was incorporated into the loan agreement, along with IFC's Performance Standards and other environmental guidelines. *See* Ex. 1 to Karim Decl. [ECF No. 10-5 & -6] (Schedule I to Loan Agreement) at 91–92 (requiring CGPL to comply with the "Environmental and Social Requirements"); *see also id.* at 13–14 (defining "Environmental and Social Requirements").

Plaintiffs include fishermen and farmers who live and work near the Plant, suing on behalf of themselves and others similarly situated; a local trade union

(MASS) dedicated to protection of fisherworkers' rights; and the local government of a nearby village. *See* Compl. ¶¶ 13–15. In plaintiffs' view, CGPL and IFC have failed to honor their commitments. They point to a host of negative environmental and social impacts allegedly caused by the operation of the Plant: hot water from the cooling system has substantially altered the marine environment, depressing the fish catch near the shore; the water intake channel has leaked saltwater into the groundwater, thereby making it unsuitable for drinking or irrigation; emissions have significantly degraded local air quality; local fisherman and farmers have been displaced. *See* Pls.' Opp'n [ECF No. 22] at 3–5; *see also* Compl. ¶¶ 74–115. Plaintiffs feel that, when these individual impacts are considered in the aggregate, their "way of life [has been] fundamentally threatened or destroyed by the Tata Mundra Plant." Compl. ¶ 6.

Plaintiffs blame IFC for the injuries they have suffered. In their view, if IFC had "follow[ed] its own policies and enforce[d] the conditions of the loan agreement," the negative environmental and social impacts caused by the Plant could have been avoided, minimized, or mitigated. Compl. ¶ 191; *see id.* ¶¶ 176–92. Based on that conviction, plaintiffs filed a complaint with IFC's Compliance Advisor Ombudsman (CAO). *See* Ex. 6 to Zeidan Decl. [ECF No. 10-13]. The CAO is IFC's "independent recourse and accountability mechanism . . . for environmental and social concerns." Ex. 3 to Zeidan Decl. [ECF No. 10-10] (CAO Operational Guidelines) at 4. But the CAO's compliance function is focused on IFC's environmental and social performance, not on the performance of IFC's clients. *Id.* at 22. CAO compliance investigations

focus on whether IFC has "fail[ed] to address environmental and/or social issues as part of [its] review process," and whether that failure has "resulted in outcomes that are contrary to the desired effect of the [IFC's] policy provisions." *Id.* at 24. The final investigation report, which is made available on the CAO's website, will detail any identified policy violations. *Id.* at 25. However, the CAO is not a court, has "no authority with respect to judicial processes," and creates no "legal enforcement mechanism." *Id.* at 4. Thus, the CAO cannot compel IFC to right its wrongs, or to provide remedies to individuals who have been harmed by IFC-financed projects.

Plaintiffs understand that well. The CAO investigation into their complaint concluded that IFC had failed adequately to consider the environmental and social risks to which plaintiffs would be exposed as a result of the Plant's development. *See* Ex. 11 to Zeidan Decl. [ECF No. 10-18] (CAO Audit Report) at 4. In the CAO's estimation, IFC then compounded that error by failing to perform an environmental and social impact assessment "commensurate with project risk," and by failing to "address [subsequent] compliance issues during [project] supervision." *Id.*; *see also id.* at 50–53 (summarizing the key compliance findings). IFC responded with a letter challenging some of the CAO's conclusions, *see* Ex. 12 to Zeidan Decl. [ECF No. 10-19], and with a statement laying out a ten-item action plan to address any compliance shortcomings, *see* Ex. 13 to Zeidan Decl. [ECF No. 10-20]. But the CAO was unimpressed. In a subsequent monitoring report, it explained that "a number of its findings suggest the need for a rapid, participatory and expressly remedial approach to assessing and addressing project impacts

raised by [plaintiffs]." Ex. 14 to Zeidan Decl. [ECF No. 10-21] at 5. In the eyes of the CAO, the action plan proposed by IFC and CGPL fell short of that mark. *Id.* The matter remains open for continued monitoring. Def.'s Mot. to Dismiss at 7.

Seeking the relief they cannot obtain from the CAO, plaintiffs have filed a complaint in this Court. Their case is focused on "the irresponsible and negligent conduct of the International Finance Corporation in appraising, financing, advising, supervising and monitoring its significant loan to enable the development of the Tata Mundra Project in Gujarat, India." Compl. ¶ 2. That conduct, plaintiffs contend, gives rise to valid claims for negligence, negligent supervision, public nuisance, private nuisance, trespass, and breach of contract. *See id.* ¶¶ 294–332. As remedies, plaintiffs seek various forms of injunctive relief running against IFC or, in the alternative, compensatory and punitive damages. *See id.* ¶¶ 333–45. IFC has responded with a motion to dismiss. At the threshold, IFC believes plaintiffs' suit is barred by the International Organizations Immunities Act (IOIA), 22 U.S.C. § 288 *et seq.* Alternatively, IFC asks the Court to dismiss on grounds of *forum non conveniens* or for failure to join indispensable third parties. Finally, IFC argues that some of the counts in plaintiffs' complaint fail to state a claim upon which relief can be granted. *See* Def.'s Mot. to Dismiss at 1–2. As the Court agrees that IFC is immune from plaintiffs' suit, it will address only IFC's threshold immunity argument.

LEGAL STANDARD

IFC's immunity claim seeks dismissal for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). As "[f]ederal courts are courts of limited jurisdiction[,] . . . [i]t is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting" it. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted). Thus, plaintiffs must establish jurisdiction by a preponderance of the evidence. *See* Gordon v. Office of the Architect of the Capitol, 750 F. Supp. 2d 82, 87 (D.D.C. 2010). In making this determination, "the Court must accept as true all of the factual allegations contained in the complaint," but those allegations "will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Id.* at 86–87 (internal quotation marks and citations omitted).

DISCUSSION

"It is well established that statutes like the IOIA that grant immunity to foreign nations and international organizations limit the District Court's jurisdiction over parties that are entitled to such protection." *Weinstock v. Asian Dev. Bank*, 2005 WL 1902858, at *3 (D.D.C. July 13, 2005). "The International Organizations Immunities Act applies to those international organizations which the President designates as entitled to [its] benefits . . . ." *Osseiran v. Int'l Finance Corp.*, 552 F.3d 836, 838 (D.C. Cir. 2009). IFC is among those organizations that have been so designated. *Id.* (citing Exec. Order No. 10,680, 21 Fed. Reg. 7,647 (Oct. 2, 1956)). Under the IOIA, IFC

generally "enjoy[s] the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). "When Congress enacted the IOIA in 1945, foreign sovereigns enjoyed—contingent only upon the State Department's making an immunity request to the court—'virtually absolute immunity.'" *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)). The IOIA thus confers that same absolute immunity upon international organizations like IFC. *Id.* at 1341. Immunity may be waived, however, "for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. § 288a(b).

IFC's Articles of Agreement contain such a waiver provision. Titled "Position of the Corporation with Regard to Judicial Process," it reads:

> Actions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Corporation shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Corporation.

Articles of Agreement, Art. VI, § 3.[1] Based on the broad language of this waiver, one might conclude that IFC retained immunity only from suits by its members. The D.C. Circuit, however, has instructed courts to read such waivers more narrowly, with careful attention to "the interrelationship between the functions of the [IFC] set forth in the Articles of Agreement and the underlying purposes of international immunities." *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983).

"'Since the purpose of the immunities accorded to international organizations is to enable the organizations to fulfill their functions, applying the same rationale in reverse, it is likely that most organizations would be unwilling to relinquish their immunity without receiving a corresponding benefit which would further the organization's goals.'" *Atkinson*, 156 F.3d at 1338 (quoting *Mendaro*, 717 F.2d at 617). Waivers should be more broadly construed only "when the waiver would arguably enable the organization to pursue more effectively its institutional goals." *Vila*, 570 F.3d at 278–89 (internal quotation marks omitted). On the other hand, "'when the benefits accruing to the organization as a result of the waiver would be substantially outweighed by the burdens caused by judicial scrutiny of the organization's discretion to select and administer its programs, it is logically less probable that the organization actually intended to waive its immunity.'" *Id.* at 279 (quoting *Mendaro*, 717 F.2d at 617). The relevant question is

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[1] IFC's waiver provision is identical to that of its parent entity, the World Bank, *Osseiran*, 552 F.3d at 839, and nearly identical to that of the Inter-American Investment Corporation, *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 278 (D.C. Cir. 2009).

thus "whether a waiver of immunity to allow this type of suit, by this type of plaintiff, would benefit the organization over the long term." *Osseiran*, 552 F.3d at 840. Hence, immunity "should be construed as not waived unless the particular type of suit would [further] [IFC's] objectives." *Atkinson*, 156 F.3d at 1338.

As a general matter, "promises founded on good faith alone are worth less than obligations enforceable in court." *Osseiran*, 552 F.3d at 187. International organizations, which must often participate in the marketplace in order to fulfill their chartered functions, may therefore waive their immunity from certain kinds of suits to enhance their credibility in dealings with certain counterparties. The World Bank, for example, waives its immunity for suits arising out of its "commercial transactions with the outside world," brought by "its debtors, creditors, bondholders, and those other potential plaintiffs to whom the Bank would have to subject itself to suit in order to achieve its chartered objectives." *Mendaro*, 717 F.2d at 615, 618. IFC has waived immunity for a suit by a prospective buyer of an IFC investment, who brought promissory estoppel and breach of confidentiality claims after the deal soured. *Osseiran*, 552 F.3d at 840–41. And the Inter-American Investment Corporation was not immune from the unjust enrichment claim of an independent consultant who had provided advisory services to the organization without being paid. *Vila*, 570 F.3d at 276–78.

Plaintiffs believe their suit fits comfortably within this precedent. Because their suit arises from IFC's "*external* activities and relationships with host communities," and because IFC "could not function without credible policies and promises" to those

communities, plaintiffs argue that a waiver would benefit IFC here. Pls.' Opp'n at 22. But plaintiffs' argument glosses over some material differences between those waiver of immunity cases and this one. International organizations have previously waived immunity for suits brought by individual plaintiffs with whom the organization had a direct commercial relationship. Here, on the other hand, plaintiffs are a would-be class of fishermen and farmers, and two institutional plaintiffs that represent their interests—none of whom have a commercial relationship with IFC. *See* Compl. ¶¶ 6, 13–15. Nor is this the type of suit for which waiver has previously been found. In both *Osseiran* and *Vila*, the underlying claims invoked principles of contract law. *See Vila*, 570 F.3d at 276. Plaintiffs' claims, however, sound primarily in tort. *See* Compl. ¶¶ 294–324 (asserting claims for negligence, negligent supervision, public nuisance, private nuisance, and trespass); *see also Banco de Seguros del Estado v. Int'l Finance Corp.*, 2007 WL 2746808, at *5–6 (S.D.N.Y. Sept. 20, 2007) (IFC did not waive immunity for negligent supervision claim by third-party). True, plaintiffs do bring one claim for breach of contract. *See* Compl. ¶¶ 325–32. But it is a stretch to characterize that claim, as plaintiffs attempt to do, as one arising purely from IFC's external activities. Plaintiffs' own complaint characterizes the suit as one that "arises out of" IFC's "irresponsible and negligent conduct . . . in appraising, financing, advising, supervising and monitoring its significant loan" to CGPL. *Id.* ¶ 2. By focusing on IFC's internal decision-making processes, the suit invites—indeed, demands—"judicial scrutiny of the [IFC's] discretion to select and administer its programs." *Vila*, 570 F.3d at 279 (internal quotation marks omitted). Waiver of

immunity is highly unlikely in such circumstances. *See Mendaro*, 717 F.2d at 617.

Nonetheless, in assessing the claim that immunity has been waived, the Court remains obliged to weigh the benefits and costs that a waiver may entail. *Vila*, 570 F.3d at 281. On the cost side of the ledger, the Court may appropriately consider the litigation costs inherent in defending this type of suit. *See Atkinson*, 156 F.3d at 1339. In cases where the D.C. Circuit has found a waiver, the organization has failed to come forward with robust arguments about costs. *See Osseiran*, 552 F.3d at 841 ("International Finance identifies no unique countervailing costs . . . ."); *Vila*, 570 F.3d at 281 (The Inter-American Investment Corporation "has not identified countervailing costs that are distinguishable from the costs associated with a claim for promissory estoppel."). But here, IFC argues that waiver would "produce a considerable chilling effect on IFC's capacity and willingness to lend money in developing countries," by opening "a floodgate of lawsuits by allegedly aggrieved complainants from all over the world." Def.'s Reply [ECF No. 23] at 9–10. Litigation of this kind, in other words, would "open [IFC] to disruptive interference with its lending policies." *Vila*, 570 F.3d at 281 (internal quotation marks and brackets omitted). Since this type of suit is aimed at IFC's internal decision-making process, the Court has little reason to doubt IFC's assessment of its concerns.

But plaintiffs take issue with IFC's cost contentions. IFC will only incur this cost, plaintiffs' argument goes, if it persists in providing loans "irrespective of the environmental and human toll." *See* Pls.' Opp'n at 26. To avoid litigation, IFC can

simply "choose projects and partners that follow IFC policy and obey the law." *Id.* at 27. If it fails to do so, some suits may be filed. But because each of these suits would seek only to encourage "IFC's management to do what the IFC already requires," plaintiffs assert, the suits would actually *benefit* IFC and further its development goals. *Id.* at 26. Thus, in plaintiffs' view, the "costs" identified by IFC are not costs at all. *Id.*

Plaintiffs cannot so easily blur the boundaries between cost and benefit. The D.C. Circuit has identified "judicial scrutiny of the organization's discretion to select and administer its programs" as a burden or cost, without regard to whether the underlying litigation is meritorious or in some other sense deserved. *See Mendaro*, 717 F.2d at 617. This Court will not completely dismiss the possibility that a waiver could provide some incentive for IFC to adhere more scrupulously to its policies, over and above the pressure already applied by the CAO. But that marginal benefit must be weighed against the relevant costs which, in suits like this by these kinds of plaintiffs, remain quite substantial.

Plaintiffs also offer a more modest theory regarding the benefits of waiver in cases where the CAO has identified a compliance failure but IFC has failed to deliver a remedy. *See* Pls.' Opp'n at 25–26. IFC-funded projects are likely to be more successful when they garner support from local communities, plaintiffs argue. If, however, IFC can breach its environmental and social policies without providing redress to those who are negatively impacted, that support will be difficult to secure. Local communities "may hesitate to do business with an entity insulated from judicial process," *Vila*, 570 F.3d at 279 (internal

quotation marks omitted), and may instead decide to "fight [IFC] projects tooth and nail," Pls.' Opp'n at 22. Waiver of immunity, plaintiffs contend, is the solution to this problem. By creating a legal avenue for the redress of environmental and social harms, IFC can credibly assuage any doubts that local communities may harbor about hosting IFC-funded projects.[2] *See id.* at 21–26.

Although plaintiffs' argument makes some intuitive sense, it is ultimately insufficient to support a finding of waiver here. As an initial matter, the Court hesitates to extend the "credibility" theory upon which plaintiffs rely outside the context of commercial transactions, where it was initially developed and has been exclusively applied. But even if the Court were to stretch that theory to reach this case, plaintiffs would not prevail. The preceding analysis has left plaintiffs with a daunting task. To support a finding of waiver, they must point to a benefit that would justify opening the courthouse doors to a new type of plaintiff, bringing a new and very broad type of suit, more costly than those that have previously been allowed and aimed squarely at IFC's discretion to select and administer its own projects. Plaintiffs' benefit argument simply cannot bear that substantial weight. Immunity "should be construed as *not waived* unless

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[2] Plaintiffs also argue that waiver would help IFC maintain the support of donor governments like the United States. *See* Pls.' Opp'n at 24. But the United States government has adequate tools at its disposal to make its view on IFC's immunity known directly—specifically, the "President retains authority to modify, condition, limit, and even revoke the otherwise absolute immunity of a designated organization," *Atkinson*, 156 F.3d at 1341. In this setting, the Court thinks it unwise to speculate as to the United States government's views on IFC's immunity.

the particular type of suit would *further* [IFC's] objectives." *Atkinson*, 156 F.3d at 1338. Any "ties go to the organization." *Vila*, 570 F.3d at 286 (Williams, J., dissenting). In the Court's view, for all the reasons reviewed above, suits like plaintiffs' are likely to impose considerable costs upon IFC without providing commensurate benefits. Hence, IFC has not waived its immunity to this suit.

The Court can deal quickly with plaintiffs' remaining arguments, which urge several changes to the D.C. Circuit's immunity jurisprudence. First, plaintiffs believe *Atkinson* was incorrectly decided. Citing the Third Circuit's decision in *OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756 (3d Cir. 2010), plaintiffs argue that the IOIA was intended to incorporate subsequent changes to the law of foreign sovereign immunity (like the Foreign Sovereign Immunities Act's commercial activity exception), rather than to preserve the understanding of foreign sovereign immunity that prevailed in 1945. *See* Pls.' Opp'n at 19–20. Plaintiffs also argue, citing several FSIA decisions by the Supreme Court, that *Atkinson* mischaracterized the pre-1945 law by holding that it had provided absolute immunity for foreign sovereigns. *See id.* at 14–19. Finally, they intend to argue on appeal that *Mendaro*'s "corresponding benefit" test, which structured the preceding analysis, "unduly narrows the plain meaning of the IFC's waiver." *Id.* at 21 n.12.

But as plaintiffs recognize, this Court cannot overturn *Mendaro* or *Atkinson*. Nor will it authorize an end-run around *Atkinson*, which the D.C. Circuit said less than two years ago "remains vigorous as Circuit law." *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277,

281 (D.C. Cir. 2014). This Court's role is to apply Circuit law, not to "reconsider" it. *Cf.* Steven Herz, *International Organizations in U.S. Courts: Reconsidering the Anachronism of Absolute Immunity*, 31 Suffolk Transnat'l L. Rev. 471 (2008) (making plaintiffs' arguments). Perhaps the D.C. Circuit will adopt plaintiffs' suggested approach to questions concerning waivers of international organization immunity. This Court, however, cannot do so. And plaintiffs' invitation to the Court to undertake such a revision of controlling case law simply underscores the conclusion that, under that precedent, plaintiffs' waiver claim fails.

CONCLUSION

Because IFC has not waived its immunity from this suit, its motion to dismiss will be granted, and plaintiffs' complaint will be dismissed in its entirety. A separate Order has issued on this date.

/s/
JOHN D. BATES
United States District Judge

Dated: March 24, 2016

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16-7051 **September Term, 2017**
1:15-cv-00612-JDB
Filed On:
September 26, 2017

Budha Ismail Jam, et al.,
Appellants

v.

International Finance Corporation,
Appellee

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges; Edwards and Silberman, Senior Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Ken R. Meadows
Deputy Clerk

APPENDIX D

Subchapter XVIII—Privileges and Immunities of International Organizations

22 U.S.C. § 288. "International organization" defined; authority of President

For the purposes of this subchapter, the term "international organization" means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this subchapter (including the amendments made by this subchapter) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The President shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities provided in this subchapter or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question

shall cease to be classed as an international organization for the purposes of this subchapter.

§ 288a. Privileges, exemptions, and immunities of international organizations

International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section, as follows:

(a) International organizations shall, to the extent consistent with the instrument creating them, possess the capacity—

(i) to contract;

(ii) to acquire and dispose of real and personal property;

(iii) to institute legal proceedings.

(b) International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

(c) Property and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, unless such immunity be expressly waived, and from confiscation. The archives of international organizations shall be inviolable.

(d) Insofar as concerns customs duties and internal-revenue taxes imposed upon or by reason of importation, and the procedures in connection

therewith; the registration of foreign agents; and the treatment of official communications, the privileges, exemptions, and immunities to which international organizations shall be entitled shall be those accorded under similar circumstances to foreign governments.

No. 17-1011

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, ET AL.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In 1945, Congress enacted the International Organizations Immunities Act ("IOIA"), 22 U.S.C. § 288a(b), to protect international organizations composed of numerous member states from suit in domestic courts. The IOIA provides that international organizations designated by the President enjoy "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). At the time, foreign states were entitled to virtually absolute immunity. The IOIA further provides that the President may in his discretion revoke, condition, or limit the immunity of any designated international organization. *Id.* at § 288. The question presented is:

Whether the Court of Appeals correctly held that the IOIA does not incorporate subsequent developments in the law of foreign-state immunity, including those enacted in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603 *et seq.*

RULE 29.6 STATEMENT

International Finance Corporation was established in 1956 by its founding multilateral treaty, the IFC Articles of Agreement. As a public international organization, IFC is owned by the governments of 184 nations.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT OF THE CASE 4

I. Statutory Framework 4

II. International Finance Corporation 6

III. Background And Proceedings Below 8

A. IFC Finances A Portion Of The Tata Mundra Power Project 8

B. Petitioners File CAO Complaint 9

C. The District Court Dismisses Petitioners' Suit 10

D. The D.C. Circuit Affirms And Denies Rehearing En Banc 12

REASONS FOR DENYING THE PETITION 14

I. The Court Of Appeals' Construction Of The IOIA Is Correct, And It Does Not Warrant This Court's Review 14

A. The Court Of Appeals' Construction Of The IOIA Is Correct 15

B. Any Conflict Between The D.C. Circuit And The Third Circuit Concerning The Interpretation Of The IOIA Does Not Warrant Review 26

II. The Court Of Appeals' Construction Of The IFC's Articles Of Agreement Does Not Warrant This Court's Review 29

III. This Court's Review Is Unwarranted For The Additional Reason That Petitioners Would Not Benefit From A Ruling In Their Favor 33

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

CASES

Aguado v. Inter-Am. Dev. Bank,
85 F. App'x 13 (D.C. Cir. 2004) 28

Alfred Dunhill of London, Inc. v. Republic of Cuba,
425 U.S. 682 (1976) 4, 15-16, 18, 23

Ashford Int'l, Inc. v. World Bank Grp.,
No. 04-3822, 2006 WL 783357
(N.D. Ga. Mar. 24, 2006) 28, 30

Atkinson v. Inter-Am. Dev. Bank,
156 F.3d 1335 (D.C. Cir. 1998) ..... *passim*

Banco de Seguros del Estado v. IFC,
No. 06-2427, 2007 WL 2746808
(S.D.N.Y. Sept. 20, 2007) 30

Broadbent v. Org. Am. States,
628 F.2d 27 (D.C. Cir. 1980) ..... *passim*

Brzak v. U.N.,
551 F. Supp. 2d 313 (S.D.N.Y. 2008) 27

do Rosario Veiga v. WMO,
568 F. Supp. 2d 367 (S.D.N.Y. 2008) 27

Dole Food Co. v. Patrickson,
538 U.S. 468 (2003) 18

Dujardin v. Int'l Bank for Reconstruction & Dev.,
9 F. App'x 19 (D.C. Cir. 2001) 28

Fazzari v. Inter-Am. Dev. Bank,
85 F. App'x 776 (D.C. Cir. 2004) 28

Garb v. Republic of Poland,
440 F.3d 579 (2d Cir. 2006) 19

Greenspan v. Crosbie,
No. 74-4734, 1976 WL 841
(S.D.N.Y. Nov. 23, 1976) 24

Gulf Oil Corp. v. Gilbert,
330 U.S. 501 (1947) 11

Hudes v. Aetna Life Ins. Co.,
806 F. Supp. 2d 180 (D.D.C. 2011) 27, 28

In re Dinastia, L.P.,
381 B.R. 512 (S.D. Tex. 2007) 30

In re Kaiser Grp. Int'l, Inc.,
730 F. Supp. 2d 247 (D.D.C. 2010) 27

Laventure v. U.N.,
No. 14-1611, 2017 WL 3671175
(E.D.N.Y. Aug. 23, 2017) 27

Lempert v. Rice,
956 F. Supp. 2d 17 (D.D.C. 2013) 27

Mendaro v. World Bank,
717 F.2d 610 (D.C. Cir. 1983) 13, 30, 32

Nat'l City Bank v. Republic of China,
348 U.S. 356 (1955) 15, 23

Nicol v. U.N. Missions,
No. 09-1800, 2009 WL 2370179
(E.D. Pa. July 30, 2009) 27

Nyambal v. IMF,
772 F.3d 277 (D.C. Cir. 2014) 26, 27

OBB Personenverkehr AG v. Sachs,
136 S. Ct. 390 (2015) 33, 34

Olegovna v. Putin,
No. 16-0586, 2016 WL 3093893
(E.D.N.Y. June 1, 2016) 27

OSS Nokalva v. Eur. Space Agency,
617 F.3d 756 (3d Cir. 2010) 3, 26, 28

Osseiran v. IFC,
552 F.3d 836 (D.C. Cir. 2009) 30

Permanent Mission of India to the U.N. v. City of N.Y.,
551 U.S. 193 (2007) 4

Polak v. IMF,
657 F. Supp. 2d 116 (D.D.C. 2009) 28

The Pesaro,
277 F. 473 (S.D.N.Y. 1921) 16

Price v. Unisea, Inc.,
289 P.3d 914 (Alaska 2012) 27

Sadikoğlu v. UNDP,
No. 11-0294, 2011 WL 4953994
(S.D.N.Y. Oct. 14, 2011) 27

Samantar v. Yousuf,
560 U.S. 305 (2010) ..... *passim*

Sampaio v. Inter-Am. Dev. Bank,
806 F. Supp. 2d 238 (D.D.C. 2011) 27

Sampaio v. Inter-Am. Dev. Bank,
468 F. App'x (D.C. Cir. 2012) 28

The Schooner Exchange v. McFaddon,
11 U.S. (7 Cranch) 116 (1812) 4

Sinochem Int'l Co. v. Malay Int'l Shipping Corp.,
549 U.S. 422 (2007) 34

Smith v. World Bank Grp.,
99 F. Supp. 3d 166 (D.D.C. 2015) 27

Smith v. World Bank Grp.,
694 F. App'x 1 (D.C. Cir. 2017) 28

United States v. Deutsches Kalisyndikat Gesellschaft,
31 F.2d 199 (S.D.N.Y. 1929) 16

Verlinden B.V. v. Cent. Bank of Nigeria,
461 U.S. 480 (1983) 15, 18, 23

Vila v. Inter-Am. Inv. Corp.,
536 F. Supp. 2d 41 (D.D.C. 2008) 27

Vila v. Inter-Am. Inv. Corp.,
570 F.3d 274 (D.C. Cir. 2009) 30

Zuza v. Off. of High Representative,
107 F. Supp. 3d 90 (D.D.C. 2015) 27

STATUTES

22 U.S.C. § 282 1

22 U.S.C. § 282g 8

22 U.S.C. § 288 ..... *passim*

22 U.S.C. § 288a ..... *passim*

22 U.S.C. § 288d 19

22 U.S.C. § 288f 19

22 U.S.C. § 288f–1 ..... 6, 28

22 U.S.C. § 288f–2 6

28 U.S.C. § 1603 ..... 5, 21

28 U.S.C. § 1605 ..... 5, 21, 29, 33, 34

TREATIES

IFC Articles of Agreement, Dec. 5, 1955,
7 U.S.T. 2197, T.I.A.S. No. 3620 ..... *passim*

RULES AND REGULATIONS

Exec. Order No. 10,680,
3 C.F.R. 86 (Supp. 1956) 8

Exec. Order No. 13,759,
82 Fed. Reg. 5323 (Jan. 12, 2017) 26

LEGISLATIVE MATERIALS

91 Cong. Rec. 12,432 (1945) .....

91 Cong. Rec. 12,530 (1945) 20

91 Cong. Rec. 12,532 (1945) 20

101 Cong. Rec. 13,409 (1990) 21

Bill to Provide for Participation of the United States in IFC: Hearing on S. 1894 Before the S. Subcomm. on Banking & Currency,
84th Cong. (1955) 6, 7

H. R. 4489, 79th Cong. (1945) 20

H.R. Rep. No. 79-1203 (1945) 5

H.R. Rep. No. 84-1299 (1955) 6

H.R. Rep. No. 89-1099 (1965) 28

H.R. Rep. No. 105-802 (1998) 21

S. Rep. No. 79-861 (1945) 16, 20

BRIEFS OF THE UNITED STATES

Brief for the United States as Amicus Curiae, *Georges v. U.N.*, 834 F.3d 88 (2d Cir. 2016) (No. 15-455) 34

Reply in Support of Statement of Interest of the United States, *Lempert v. Rice*, 956 F. Supp. 2d 17 (D.D.C. 2013) (No. 12-1518) 25

OTHER AUTHORITIES

Alice Ehrenfeld, *United Nations Immunity Distinguished From Sovereign Immunity*, 52 Am. Soc'y Int'l L. Proc. 88 (1958) 22-23

European Space Agency, *New Member States* 28

Executive Directors of the International Bank for Reconstruction and Development, *Explanatory Memorandum on the Proposed Articles of Agreement of the International Finance Corporation* (1955) 31

IFC, *A Record Year*, News & Views, Nov. 2017 7

Joshua M. Javits, *Internal Conflict Resolution at International Organizations*, 28 A.B.A. J. Lab. & Emp. L. 223 (2013) 9

Letter from Roberts B. Owen, Legal Adviser, Dep't of State, to Leroy D. Clark, Gen. Counsel, EEOC (June 24, 1980), in Marian L. Nash, Contemporary Practice of the United States Relating to International Law, 74 Am. J. Int'l L. 917 (1980) 31, 32

Privileges and Immunities, 13 Whiteman Digest 23, 32

Secretary of State, *Report to the President on the Results of the San Francisco Conference* (1945) 23

U.S. Dep't of State, 9 Foreign Affairs Manual (2017)..... 6

Yuen-Li Liang, *The Legal Status of the United Nations in the United States*, 2 Int'l L. Q. 577 (1948)..... 32

INTRODUCTION

This case involves potential lender liability arising from the alleged environmental impact of a power plant in Gujarat, India. Petitioners are Indian nationals who allege that they were harmed by those impacts. The power plant is owned and operated by an Indian company (not Respondent). All of the alleged injuries occurred in India.

Respondent International Finance Corporation ("IFC") is a public international organization owned by 184 member countries, including the United States. It is headquartered in Washington, D.C. In 1956, President Eisenhower designated IFC an international organization under the International Organizations Immunities Act ("IOIA") and the IFC statute, 22 U.S.C. § 282 *et seq.*; such designation entitles IFC to enjoy the privileges and immunities conferred by the IOIA, subject only to waiver and to revision or revocation by the President.

This Court should deny the Petition because the D.C. Circuit correctly interpreted and straightforwardly applied the IOIA to bar Petitioners' suit. The immunity from suit conferred by the IOIA is virtually absolute, and Congress expressly provided a means for adjusting that immunity over time: the President may withdraw or limit an organization's immunity. The immunity conferred in the IOIA was not altered, decades later, by the passage of the Foreign Sovereign Immunities Act ("FSIA")—a different statute, covering different entities, with different motivating principles. If the passage of the FSIA had fundamentally altered IOIA immunity, it would subject some organizations, i.e.,

those created for the primary purpose of development through financing, to the possibility of suit in the United States in respect of many, if not all, of their activities.

The IOIA's text, legislative history, and purpose support the D.C. Circuit's view of IOIA immunity as de-linked from foreign-sovereign immunity. Foundational concepts under foreign-sovereign immunity, like reciprocity and foreign-official immunity, do not track under the IOIA. Moreover, the principles animating international-organization immunity and those animating foreign-sovereign immunity differ substantially: The main principle of international-organization immunity is to prevent any single member country from possessing outsized influence through its national courts over the actions of the organization; by contrast, the main principles of foreign-sovereign immunity are to foster comity among co-equal sovereigns based and to gain favorable reciprocal treatment in foreign relations. Thus, the IOIA expressly rejects reciprocity as a consideration relevant to organization immunity and grants officers of international organizations an immunity that is less comprehensive than that enjoyed by officials of foreign states. Far from "anomalous," it is predictable that Congress considered international organizations differently than their individual member-country owners.

Under Petitioners' view, the passage of the FSIA altered not only the eponymous foreign sovereigns but also any and all immunities *related to* foreign sovereigns. But this is not so. In *Samantar v. Yousuf*, 560 U.S. 305 (2010), this Court rejected

precisely this view, holding that the FSIA did not govern other forms of immunity—in that case, foreign-official immunity. In doing so, this Court rejected the same "anomalous result" arguments Petitioners offer here.

What *is* anomalous is the Third Circuit's decision in *OSS Nokalva v. European Space Agency*, 617 F.3d 756 (3d Cir. 2010). However, that lone panel decision does not create a conflict warranting this Court's review. Not only are suits against international organizations uncommon, but also they frequently do not even involve the application of the IOIA. Further, in nearly all of them, the international organization would enjoy immunity from suit even under the restrictive theory adopted by the Third Circuit. Thus, Petitioners' questions presented are unlikely to recur.

Likewise, this Court should decline Petitioners' request to correct the D.C. Circuit's "error" in its reading of IFC's charter, the IFC Articles of Agreement. Both the District Court and the Court of Appeals interpreted Article VI, § 3 of the IFC Articles of Agreement consistently with the entire charter, including the provision explaining that the charter's waiver language is intended to enable IFC "to fulfill the functions with which it is entrusted." If Petitioners' interpretation prevailed, almost every financing IFC made anywhere in the world could be the subject of a lawsuit in Washington, D.C., by any number of plaintiffs who may have some asserted interest in the development project at issue. U.S. courts would routinely be asked to scrutinize IFC's internal decision-making.

Finally, even if Petitioners were correct that the FSIA applies to international organizations, IFC would still be immune from Petitioners' claims because they do not fit within the FSIA's commercial-activity exception. The gravamen of Petitioners' suit is the alleged tortious operation of a power plant in Gujurat, India. Because the gravamen of their claims is neither commercial activity in the United States nor an act in the United States related to commercial activity elsewhere, the FSIA's commercial-activity exception to immunity from suit would not apply.

STATEMENT OF THE CASE

I. Statutory Framework

Foreign sovereigns have historically been entitled to immunity from suit in U.S. courts. *See The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). For much of the Nation's history, until 1952, the Executive Branch—to which courts deferred—applied a theory of absolute immunity, under which foreign states generally could not be subject to suit without their consent. *See Samantar v. Yousuf*, 560 U.S. 305, 311-12 (2010). In 1952, the Department of State adopted the "restrictive" theory of foreign-sovereign immunity. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976). Under that theory, foreign states were granted immunity for their sovereign acts but not their commercial acts. *Permanent Mission of India to the U.N. v. City of N.Y.*, 551 U.S. 193, 199 (2007). In 1976, Congress enacted the FSIA, which essentially codified the restrictive theory of sovereign immunity, and which now provides the sole basis for obtaining jurisdiction over a foreign state, or its agencies and

instrumentalities, in a civil case. 28 U.S.C. § 1603 *et seq.*; *id.* § 1605(a)(2) (codifying commercial-activities exception).

Separately, in the aftermath of World War II, the United States and the international community created numerous public international organizations (i.e., organizations whose membership is composed of the United States and foreign governments). As those organizations began to conduct activities in the United States, Congress recognized the need to confer on them immunity from suit in U.S. courts. H.R. Rep. No. 79-1203, at 1-2 (1945). That immunity would ensure that courts of the United States—a single member state—would not increase the burdens, financial and otherwise, of organizations whose activities represent the collective efforts of multiple foreign sovereigns.

In 1945, Congress enacted the IOIA to provide international organizations designated by executive order with immunity from suit. Specifically, the IOIA provides international organizations with "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). An international organization "may expressly waive [its] immunity for the purpose of any proceedings or by the terms of any contract." *Id.* Additionally, the President may revoke, condition, or limit the immunity of any designated international organization "if, in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities provided . . . or for any other reason, at any time." *Id.* § 288.

Since 1945, U.S. Presidents have designated at least 82 entities as "international organizations" under the IOIA. U.S. Dep't of State, 9 Foreign Affairs Manual 402.3-7(M) (2017). The United States is a member of some of these organizations, such as the World Bank and IFC. However, Presidents have also designated certain entities as "international organizations" entitled to IOIA immunity even though the United States is not a member and is not bound via treaty, such as the European Space Agency. *See, e.g.*, 22 U.S.C. § 288f–1 (ESA and Organizations of Eastern Caribbean States); *id.* § 288f–2 (African Union).

II. International Finance Corporation

IFC was founded in 1956 by its constitutional treaty, the IFC Articles of Agreement, Dec. 5, 1955, 7 U.S.T. 2197, T.I.A.S. No. 3620 [hereinafter "IFC Articles"]. IFC was designed to foster development in the private sector, in part through strategic lending. *See* H.R. Rep. No. 84-1299, at 1-2, 4 (1955). IFC's investments complement work by the other Bretton Woods institutions: the International Monetary Fund, which acts to stabilize world currencies, and the World Bank, which focuses on public-sector projects. *Id.*; *Bill to Provide for Participation of the United States in IFC: Hearing on S. 1894 Before the S. Subcomm. on Banking & Currency*, 84th Cong. 22-23 (1955) [hereinafter "S. 1894 Hearing"] (IFC to fill "an important gap in the existing international machinery for financing economic development").

The collective effort of these organizations was instrumental in repairing the global economy after World War II. IFC now counts 184 nations as

members, including the United States. Pet. App. 3a, 24a. It provided financing for development projects of more than $19 billion in fiscal year 2017 alone. *See* IFC, *A Record Year*, News & Views, Nov. 2017, at 1, http://www.ifc.org/wps/wcm/connect/20277329-63ef-4af1-8d5a-7778d5f4806a/IFC+Treasury+Funding+Newsletter+for+Investors+Nov+2017.pdf?MOD=AJPERES.

The United States actively negotiated both the IFC Articles and the nearly identical World Bank Articles of Agreement. *See* S. 1894 Hearing at 22 (noting "that the United States [would] take initiative in creating" IFC). IFC's chartered purpose "is to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas." IFC Articles art. I. IFC accomplishes this purpose by "assist[ing] in financing the establishment, improvement, and expansion of productive private enterprises" through lending "in association with private investors" and through advisory services to stimulate private-sector investment in member countries where capital is scarce. *Id.* art. I(i)-(iii). At the urging of the United States, the Articles prohibit IFC from "assum[ing] responsibility for managing any enterprise in which it has invested." *Id.* art. III § 3(iv); *see* S. 1894 Hearing at 28 (Statement of Treas. Sec. Humphrey) ("We in the Treasury do not think it would be desirable or feasible for [IFC] . . . to take the management responsibility which stock ownership entails.").

"To enable the Corporation to fulfill the functions with which it is entrusted," the IFC Articles protect

IFC with jurisdictional "privileges and immunities" that "shall be accorded in the territories of each member." IFC Articles art. VI § 1; *see also id.* art. VI § 10 (committing "each member . . . to mak[e] effective in terms of its own law the principles set forth in this Article").

In 1955, Congress passed the International Finance Corporation Act, which authorized the President to accept membership in IFC on behalf of the United States and declared that IFC's immunities under the Articles "shall have full force and effect in the United States . . . upon acceptance of membership by the United States in, and the establishment of, the Corporation." 22 U.S.C. § 282g. President Eisenhower signed the IFC Articles on behalf of the United States on December 5, 1955. *See* 7 U.S.T. 2197.

In 1956, the President designated IFC an "international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the . . . International Organizations Immunities Act." Exec. Order No. 10,680, 3 C.F.R. 86-87 (Supp. 1956). The President has not revoked, limited, or modified IFC's jurisdictional immunities under the IOIA.

III. Background And Proceedings Below

A. IFC Finances A Portion Of The Tata Mundra Power Project

In 2005, the Government of India began exploring major power projects that would serve some of its 400 million people lacking access to the electricity grid. The Tata Mundra Ultra Mega Power Project was

planned to "supply much-needed power for India's continued economic growth" in five Indian states. Pet. App. 23a. Coastal Gujarat Power Limited ("CGPL"), an Indian power company, developed and now operates the plant. *Id.* at 24a. Pursuant to a loan agreement and other documentation, IFC loaned $450 million to CGPL's Tata Mundra project—approximately 11% of the project's total $4.14 billion estimated cost. *Id.*

To address the potential environment and social impact of CGPL's planned project, IFC and CGPL jointly developed an Environmental and Social Action Plan ("Social Action Plan"). *Id.* at 25a. The IFC-CGPL lending agreement makes clear, however, that "managing environmental and social risks and impacts in a manner consistent with the Performance Standards" and Social Action Plan "becomes the responsibility of the client," CGPL. *Id.* (quoting Social Action Plan ¶ 7).

B. Petitioners File CAO Complaint

Because international organizations are typically immune from suit to prevent interference in their internal operations, many have developed internal "conflict resolution systems." Joshua M. Javits, *Internal Conflict Resolution at International Organizations*, 28 A.B.A. J. Lab. & Emp. L. 223, 223-224 (2013). The Compliance Advisor Ombudsman ("CAO") is IFC's internal conflict-resolution mechanism. Pet. App. 26a. "[T]he CAO's compliance function is focused on *IFC's* environmental and social performance, not on the performance of IFC's clients." *Id.* (emphasis added). The CAO "is not a court, has no authority with respect to judicial processes, and

creates no legal enforcement mechanism." *Id.* at 27a (internal quotation marks omitted).

Petitioners filed a complaint with the CAO alleging that IFC failed to prevent CGPL's plant from causing social and environmental harms because IFC did not "follow its own policies and enforce the conditions of the loan agreement" by, *inter alia*, cancelling its loan to CGPL. Pet. App. 26a (alterations in original omitted). The CAO recommended remedial measures. Pet. App. 27a-28a. CGPL then adopted a ten-point action plan to bring the plant back into compliance with IFC policy. *Id.* at 27a. At no point did the CAO recommend that IFC cancel its loan to CGPL. *Id.* at 27a-28a (citing ECF No. 10-21). The CAO continues to monitor compliance with IFC policy and makes recommendations as appropriate. *Id.* at 28a.

C. The District Court Dismisses Petitioners' Suit

Unsatisfied with the CAO process, Petitioners retained an organization engaged in environmental advocacy litigation to sue IFC in the U.S. District Court for the District of Columbia. Pet. App. 28a. Though IFC was a minority lender and lacked any management control, Petitioners allege that IFC "is primarily responsible for their injuries" caused by CGPL's plant. *Id.* at 23a. Petitioners' "complaint characterizes the suit as one that arises out of IFC's irresponsible and negligent conduct . . . in appraising, financing, advising, supervising and monitoring its significant loan to CGPL." *Id.* at 33a (internal quotation marks omitted). Their "claims are almost entirely based on tort: negligence, negligent nuisance, and trespass." *Id.* at 3a. Petitioners' complaint

alleges that, "[i]n *loaning money* for the Tata Mundra Project, the IFC engaged in substantial commercial activity in the United States, in Washington, D.C., and engaged in conduct in the United States in connection with commercial activity outside the United States." 1 D.C. Cir. JA0058 (Compl. ¶ 195) (emphasis added).

IFC moved to dismiss Petitioners' complaint on the grounds that IFC was immune from this lawsuit under the IOIA, arguing that the IOIA conferred absolute immunity on IFC.[1] IFC further argued that it had not waived its immunity in Article VI of the IFC Articles. 1 D.C. Cir. JA0107-08 (Mot. to Dismiss at 7-8). Petitioners responded that the IOIA's grant of immunity is limited by the exceptions to foreign-state immunity codified in the FSIA, and in particular, the FSIA's "commercial activity" exception. Pet. App. 37a. Alternatively, Petitioners argued that IFC had waived its immunity in Article VI of the IFC Articles. *Id.* at 32a-33a.

The District Court concluded that IFC was immune from this suit under the IOIA. Pet. App. 28a. The District Court also found that Article VI of the IFC Articles did not permit Petitioners' suit for two reasons. First, "none of [Petitioners] have a

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[1] IFC also moved to dismiss pursuant to the doctrine of *forum non conveniens* because each of the key features of this suit—Petitioners' residence, CGPL's plant, IFC's monitoring activities, most relevant witnesses, and all of the alleged injuries—centers in India. *Id.* at 28a. IFC submitted that the private- and public-interest factors point to India, which is the preferred forum for resolving Petitioners' claims. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

commercial relationship with IFC." *Id.* at 33a. Second, Petitioners' suit, which is "aimed squarely at IFC's discretion to select and administer its own projects," would "open IFC to disruptive interference with its lending policies." *Id.* at 34a, 36a (internal alteration and quotation marks omitted). Finding a sufficient reason to dismiss Petitioners' claims, the District Court granted IFC's motion but left its *forum non conveniens* ground for dismissal unaddressed. *Id.* at 28a.

D. The D.C. Circuit Affirms And Denies Rehearing En Banc

The D.C. Circuit affirmed the District Court's "well-reasoned" opinion. Pet. App. 2a. The court reaffirmed long-standing D.C. Circuit precedent holding that "foreign organizations receive[d] the immunity that foreign governments enjoyed at the time the IOIA was passed, which was 'virtually absolute immunity.'" *Id.* at 4a (quoting *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998)). The court rejected Petitioners' argument that the IOIA incorporates the FSIA's subsequently enacted "commercial activity" exception. The court explained that "when considering the [IOIA] legislation, Congress rejected a commercial activities exception." *Id.* at 5a (citing *Atkinson*, 156 F.3d at 1341). Instead, Congress "explicitly delegated the responsibility to the President" to effect changes in IOIA immunity. *Id.*

The court further concluded that IFC did not waive its immunity from this suit under Article VI of the IFC Articles. *Id.* at 10a-11a. The court found that IFC is immune from "claims arising out of core

operations," which "threaten the policy discretion of the organization," but is subject to suits arising from its "ancillary business transactions." *Id.* at 10a; *see also id.* at 9a ("The *Mendaro* test instead focused on identifying those transactions where the other party would not enter into negotiations or contract with the organization absent waiver.") (citing *Mendaro v. World Bank*, 717 F.2d 610, 617 (D.C. Cir. 1983)). Because Petitioners' suit is of the former category, IFC retains immunity. *Id.* at 11a.

Judge Pillard concurred. Pet. App. 12a-22a. She agreed that Petitioners' complaint was properly dismissed pursuant to *Atkinson* and *Mendaro*, but stated that the Court of Appeals "should revisit both *Atkinson* and *Mendaro* in an appropriate case." *Id.* at 21a.

Petitioners requested rehearing en banc but no member of the D.C. Circuit called for a poll. *See id.* at 39a (denying rehearing en banc in "the absence of a request by any member of the court for a vote").

REASONS FOR DENYING THE PETITION

I. The Court Of Appeals' Construction Of The IOIA Is Correct, And It Does Not Warrant This Court's Review

The Court of Appeals correctly held that the IOIA confers presumptively absolute immunity on international organizations, and that the scope of the immunity conferred does not change with subsequent developments in the immunity of foreign states. Rather, Congress accounted for the possibility of subsequent developments in the law and practice of foreign immunities by conferring on the President authority to limit or withdraw an international organization's immunity in appropriate circumstances.

Contrary to Petitioners' contention (Pet. 18), there is nothing remarkable about the fact that organizations' immunity is presumptively broader in scope than that of foreign states. Fundamentally different considerations animate the immunities of international organizations and foreign states. Moreover, this Court has previously recognized that the FSIA does not govern all types of foreign immunity: foreign-official immunity, which is much more closely related to foreign-sovereign immunity than is international-organization immunity, is not governed by the FSIA and can be broader than foreign-state immunity. *Samantar v. Yousuf*, 560 U.S. 305, 321-22 (2010).

This Court's review is not warranted. Although the Third Circuit has disagreed with the D.C. Circuit's construction, Petitioners' questions

presented are unlikely to recur with any frequency. International organizations often need not rely on the IOIA, as their charters also confer broad immunity that is independent of the IOIA. Further, the suits brought against such organizations often would not fall within any of the FSIA's exceptions to immunity, even if the FSIA applied. The petition for a writ of certiorari should be denied.

A. The Court Of Appeals' Construction Of The IOIA Is Correct

1. a. Enacted in 1945, the IOIA provides that international organizations "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). The phrase "same immunity from suit . . . as is enjoyed by foreign governments" had a clear, substantive meaning at the time of the IOIA's enactment: the United States "generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983); *see also Atkinson*, 156 F.3d at 1340; *Nat'l City Bank v. Republic of China*, 348 U.S. 356, 362 (1955). The authority to determine foreign-state immunity rested with the President, pursuant to his foreign-affairs power. In 1945, the Executive Branch followed a theory of absolute immunity, under which (with narrow exceptions) "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign."[2] *Alfred Dunhill of London, Inc. v.*

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[2] Although Petitioners attempt to argue (Pet. 22-24) that foreign-state immunity was not in fact "absolute" in 1945, the Executive Branch, and courts applying principles set forth by

Republic of Cuba, 425 U.S. 682, 711 (1976) (quoting Tate Letter, which set forth the Executive Branch's historical understanding of immunity).

Congress's invocation of foreign-state immunity in the IOIA thus had two substantive effects. First, it created a default rule of absolute immunity to be applied as the rule of decision in suits involving international organizations. Second, it expressed Congress's recognition that international organizations that are composed of multiple member states, including the United States, were entitled to "privileges of a governmental character," consistent with their "official" nature. S. Rep. No. 79-861, at 2 (1945).

Congress also expressly provided a mechanism by which the scope of immunity accorded to

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the Executive Branch, have not held that foreign states were subject to suit based on their commercial activities. Instead, foreign states' immunity was subject only to narrow exceptions concerning real property and merchant vessels that are not relevant here. *Alfred Dunhill*, 425 U.S. at 711-12. The decisions upon which Petitioners rely (Pet. 24) are not to the contrary. *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929), did not "deny" (Pet. 24) immunity to a foreign sovereign based on its commercial activity. The court "only" held that immunity did not apply because a suit against a state-owned corporation is "not a suit against the Republic of France or any representative of that republic." 31 F.2d at 203; *see also id.* at 200-02 (noting State Department's pre-FSIA view that a state-owned corporation has no "diplomatic status in this country" and concluding that such a corporation does not enjoy immunity merely "because its stock is owned solely by the government"). *The Pesaro*, 277 F. 473 (S.D.N.Y. 1921), involved a foreign merchant vessel that was not entitled to immunity even under the absolute theory.

international organizations could be modified over time. Section 288 delegates to the President the authority to "withhold or withdraw" immunity in "light of the functions performed by any such international organization," or to "condition or limit" the immunity in any way. 22 U.S.C. § 288; *see also Atkinson*, 156 F.3d at 1341 ("It seems, therefore, that Congress was content to delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances.").

Despite the foregoing, Petitioners contend that Congress's use of the phrase "same immunity from suit . . . as is enjoyed by foreign governments" reflects Congress's intent to incorporate subsequent developments in foreign-state immunity, such that international organizations' immunity would evolve along with foreign-state immunity. Pet. 3-4. In support of their contention, Petitioners rely on the "reference canon," which Petitioners view as establishing that Congress's reference to the immunity of foreign states presumptively should be construed to incorporate subsequent changes in the law of foreign-state immunity. Pet. 15. But that canon—which merely provides a guide to interpretation in the absence of other evidence of congressional intent—has no application here. Congress expressly provided a means of modifying international-organization immunity in light of changing circumstances, including subsequent legal developments. 22 U.S.C. § 288. That provision demonstrates that Congress intended in Section 288a to establish a substantive rule of absolute immunity, subject to subsequent modification by the President.

If the President deemed it appropriate, he could use his authority under Section 288 to establish that international organizations' immunity should be coextensive with the current scope of foreign-state immunity. In the absence of such action, however, Section 288a's rule of absolute immunity continues to control.[3]

Indeed, under Petitioners' construction, Section 288's delegation to the President would be superfluous. Under the law of foreign-state immunity existing in 1945, the Executive Branch had primary responsibility for determining the scope and application of foreign-state immunity, an authority that included the ability to alter the scope of immunity over time. *Verlinden*, 461 U.S. at 486-87; *Alfred Dunhill*, 425 U.S. at 711-12 (announcing Executive's adoption of the more limited "restrictive" theory of foreign-state immunity). Had Congress assumed that international organizations' immunity would automatically follow that of foreign states, it also would have assumed that the scope of international organizations' immunity would effectively be determined by the President's exercise of his authority to alter foreign-state immunity over time. There would have been no need expressly to

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[3] Petitioners also invoke *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), for the proposition that jurisdictional provisions phrased in the present tense require applying the law as of the time of suit. Pet. 16. But *Dole* held only that sovereign immunity must be determined based on the *facts* as they exist at the time of suit, rather than at an earlier time. 538 U.S. at 478. That well-established rule sheds no light on whether Congress intended to incorporate subsequent changes in the law of foreign-sovereign immunity in the IOIA.

provide the President with authority to "withhold or withdraw" the immunity otherwise granted by Section 288a. 22 U.S.C. § 288.

b. Various other "textual clues . . . cut against" Petitioners' argument that Congress intended to forever link organizational and sovereign immunities. *Samantar*, 560 U.S. at 306; Pet. 15. Several of the IOIA's provisions distinguish between international organizations and foreign states. For instance, Section 288f provides that international organizations are entitled to the immunity granted by Section 288a even in situations in which the Executive would condition its suggestion of a foreign state's immunity on reciprocity by that foreign state. 22 U.S.C. § 288f; *see Garb v. Republic of Poland*, 440 F.3d 579, 585 (2d Cir. 2006) (discussing importance of reciprocity concerns in traditional application of foreign-state immunity). In addition, Section 288d provides immunities for "representatives of foreign governments in or to international organizations" that are more limited than the diplomatic immunity to which foreign-state representatives are ordinarily entitled. 22 U.S.C. § 288d(b). These provisions indicate that Congress did not expect the immunities afforded by the IOIA to evolve with the common law of foreign-state immunity or otherwise. Instead, Congress created substantive rules of immunity tailored to international organizations, and granted the President discretion to modify or withdraw those immunities. *Atkinson*, 156 F.3d at 1341; 22 U.S.C. § 288.

2. The drafting history and purpose of the IOIA also counsel against Petitioners' construction.

Congress considered and rejected precisely the commercial-activity exception that Petitioners seek to graft onto the IOIA. Pet. App. 5a. Instead, Congress anticipated that the President could decide whether immunity would remain appropriate if an international organization "should engage, for example, in activities of a commercial nature." *Atkinson*, 156 F.3d at 1341 (quoting S. Rep. No. 79-861, at 2); 91 Cong. Rec. 12,530-31 (1945) (rejecting argument for express commercial-activities exception because such concern was "fully taken care of" by § 288); 91 Cong. Rec. 12,432 (1945) (remarks of Sen. Taft on "same immunity" amendment: Section 288 allows the President "to cancel any individual privilege" if organizations "go beyond the purpose of the act"). Congress thus anticipated the possibility that absolute immunity might be inappropriate in certain circumstances—and it assumed that the discretion conferred by Section 288 would enable the President to address those situations.

Petitioners contend that the drafting history indicates that Congress declined to confer absolute immunity in Section 288a. Pet. 16-17. That is incorrect. As Petitioners observe, the Senate rejected an earlier House version of the IOIA that would have conferred on international organizations "immunity from suit and every form of judicial process." Pet. 16 (quoting H. R. 4489, 79th Cong. § 2(b) (1945)). But in describing the Senate's amendments, the bill's House sponsor did not include the amendment on which Petitioners rely as one of the "substantive" amendments meriting discussion on the House floor. 91 Cong. Rec. 12,532 (1945). To the extent that the

drafting history provides any evidence of congressional intent, therefore, it indicates that Congress did not view the earlier conferral of absolute "immunity from suit" as materially different from the ultimately enacted language.[4]

3. a. Petitioners' construction of Section 288a—under which the FSIA now governs international organizations' immunity—would give rise to anomalous results.

Under Petitioners' view, the enactment of the FSIA in 1976 had the effect of shoehorning the immunity of a wide range of international organizations with vastly different functions into the FSIA's one-size-fits-all framework.[5] In particular, all organizations would be subject to suit for claims "based on" certain commercial activities. 28 U.S.C. § 1605(a)(2). For some organizations that engage in a

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[4] Petitioners state that Congress has subsequently "read the IOIA to provide only restrictive immunity." Pet. 18 (citing H.R. Rep. No. 105-802, at 13 (1998)). But that congressional report, which noted "a lack of case law on this issue," predated *Atkinson*. H.R. Rep. No. 105-802, at 13 (1998). And in any event, other subsequent congressional statements point in the opposite direction. *See* 101 Cong. Rec. 13,409 (1990) (statement of Sen. Roth concerning S. 2715) ("Even though the immunity enjoyed by foreign governments has changed, the 1945 law has not been changed and the listed international organizations retain absolute immunity.").

[5] The FSIA itself suggests no congressional intent to include international organizations within its scope. Congress did not include international organizations "in the elaborate definition of 'state' in § 1603." *Broadbent v. Org. Am. States*, 628 F.2d 27, 31 (D.C. Cir. 1980); *see Samantar*, 560 U.S. at 317 (holding that foreign officials are not included within the definition of foreign "state").

range of commercial and non-commercial activities, that would mean that a subset of their activities would potentially be subject to suit. But for other organizations, especially those that focus on financial transactions, nearly all of their activities potentially could be characterized as commercial in nature. If the commercial-activity exception's other requirements were met, those activities could be the subject of lawsuits in U.S. courts.

In effect, under Petitioners' view, the FSIA's enactment would have sub silentio abrogated immunity for a range of international organizations. That result would be entirely inconsistent with Congress's evident intent, in the IOIA, to ensure that all designated international organizations (regardless of their primary functions) would be presumptively entitled to immunity—subject only to the President's authority to make tailored immunity determinations based on the organization and the situation at issue. 22 U.S.C. § 288.

Applying the restrictive view of sovereign immunity embodied in the FSIA to all international organizations would also be inconsistent with the principles animating international-organization immunity. That immunity rests on the recognition that because such organizations are composed of numerous sovereign states, "a Member State ought not to be able to exercise power, through its national courts, over the execution of the Organization's functions or the disposition of its funds, which have, in the first instance, been determined and contributed collectively." Alice Ehrenfeld, *United Nations Immunity Distinguished From Sovereign*

Immunity, 52 Am. Soc'y Int'l L. Proc. 88, 90 (1958) (cited in Privileges and Immunities, 13 Whiteman Digest, ch. 38 § 5, at 51-55); Secretary of State, *Report to the President on the Results of the San Francisco Conference*, 158-60 (1945) [hereinafter "San Francisco Report"] (immunity designed to protect organizations from "interference by any state," especially from litigation in "the country in which [the organization] has its seat"). To hold that international organizations are categorically subject to suit for commercial activities—and the other activities made subject to suit in the FSIA—would violate this principle.

b. For much the same reasons, Petitioners are incorrect in contending (Pet. 18) that it is "anomalous" to accord international organizations presumptively absolute immunity when foreign states' immunity is narrower.

The principles animating foreign-state immunity differ in fundamental respects from those animating international-organization immunity. "[F]oreign sovereign immunity is a matter of grace and comity" that is extended from one co-equal sovereign to another based on considerations of reciprocity and foreign relations. *Verlinden*, 461 U.S. at 486; *Nat'l City Bank*, 348 U.S. at 362. The United States accordingly adopted the restrictive theory of sovereign immunity with respect to foreign states because other sovereign nations had increasingly distinguished between a state's "sovereign" and "private" acts. *Alfred Dunhill*, 425 U.S. at 712-714 (quoting Tate Letter); *Broadbent*, 628 F.2d at 30-31 (noting that the distinction between sovereign and

commercial activities is "central" to the restrictive theory). When a sovereign acted in the capacity of a private actor, suits based on those actions were understood not to raise the same comity and sovereignty concerns as suits based on sovereign acts. By contrast, any suit against an international organization implicates the fundamental concern animating its immunity: the need to avoid empowering a single member state, through its national courts, to control or burden the actions of the organization as a whole. For that reason, it is hardly anomalous to accord international organizations presumptively absolute immunity, tempered by the Executive's ability to limit immunity in appropriate situations.

More broadly, this Court has already recognized that the FSIA does not and never was intended to govern every type of immunity related to foreign-sovereign immunity. In *Samantar*, this Court held that the FSIA does not govern the immunity of foreign officials—even though foreign official immunity is grounded in the recognition that asserting jurisdiction against a foreign official for acts taken in an official capacity effectively asserts jurisdiction against the state itself. 560 U.S. at 321. The Court explained that under the common law applied by the Executive Branch, foreign officials were sometimes entitled to immunity in situations in which the state itself would not be. *Id.* at 322 (citing *Greenspan v. Crosbie*, No. 74-4734, 1976 WL 841 (S.D.N.Y. Nov. 23, 1976)). Thus, even in the context of foreign-official immunity—which is far more closely related to foreign-state immunity than is international-organization immunity—this Court did

not see anything "anomalous" in according foreign officials broader immunity than foreign states.

4. Finally, Petitioners rely heavily (Pet. 13) on a nearly forty-year-old brief filed by the United States as amicus curiae in *Broadbent*, in which the United States took the position that under the IOIA, international organizations were subject to suit based on commercial activities. *See* 3 D.C. Cir. JA1067-69. But that dated expression lacks persuasive force in light of intervening developments.[6] Although *Broadbent* itself did not decide the issue, the D.C. Circuit eventually rejected the government's view in *Atkinson*. 156 F.3d at 1341. In the 20 years since, the United States has not attempted to persuade the D.C. Circuit to reconsider its view. *Cf.* Reply in Support of Statement of Interest of the United States at 7, *Lempert v. Rice*, 956 F. Supp. 2d 17 (D.D.C. 2013) (No-12-1518), ECF No. 24 (acknowledging, in a case in which the IOIA was not dispositive, that the D.C. Circuit has held "that the immunity provided by the IOIA is 'absolute' and subject only to limitation by Executive Order").

Atkinson has long been the law; if the Executive Branch continues to disagree with *Atkinson* and believes that international organizations should be subject to suit for their "commercial activities," it would not need to go to court, but could accomplish that result by exercising its authority under Section 288 to modify or retract the immunity of specific

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[6] The United States did not support its conclusion with any analysis of the IOIA's text, its drafting history and purpose, or the immunity considerations specific to international organizations. *See* 3 D.C. Cir. JA1067-69.

international organizations. Instead, the President has continued to designate other entities as international organizations under the IOIA, providing them unqualified, absolute immunity without exceptions for commercial activities or any other activity that would be subject to suit under the FSIA. *See, e.g.*, Exec. Order No. 13,759, 82 Fed. Reg. 5323 (Jan. 12, 2017) (designating the World Organisation for Animal Health as an international organization).

B. Any Conflict Between The D.C. Circuit And The Third Circuit Concerning The Interpretation Of The IOIA Does Not Warrant Review

As Petitioners observe (Pet. 11), the Third Circuit has construed the IOIA to incorporate subsequent developments in foreign-state immunity, including the FSIA. *OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 766 (3d Cir. 2010) ("[T]he reasoning underlying the FSIA's exception for suits arising out of a government's commercial transactions from the broad immunity it otherwise accords such a government is equally applicable to international organizations and is incorporated into the IOIA."). That shallow circuit split does not warrant this Court's review. Indeed, this Court confirmed as much when it denied a petition to review the disagreement between the Third and D.C. Circuits in *Nyambal v. International Monetary Fund*. *See* 135 S. Ct. 2857 (2015) (denying petition for writ of certiorari to D.C. Circuit in 772 F.3d 277 (D.C. Cir. 2014)).

As an initial matter, suits against international organizations are uncommon. Over the past decade,

there have been only approximately 15 reported decisions concerning suits against international organizations in which IOIA-related issues have arisen.[7]

Rarer still are IOIA cases on which the questions presented would have any practical impact. Suits concerning the most frequently sued organizations—the U.N. and the IMF—do not implicate the questions presented, because those organizations (as Petitioners acknowledge) also enjoy immunity from suit under their founding treaties and thus need not

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[7] *See Laventure v. U.N.*, No. 14-1611, 2017 WL 3671175, at *5 (E.D.N.Y. Aug. 23, 2017) (dismissing suit); *Zuza v. Off. of High Representative*, 107 F. Supp. 3d 90, 91 (D.D.C. 2015) (dismissing suit), *aff'd*, 857 F.3d 935 (D.C. Cir. 2017); *Olegovna v. Putin*, No. 16-586, 2016 WL 3093893, at *1 (E.D.N.Y. June 1, 2016) (dismissing suit against IMF); *Smith v. World Bank Grp.*, 99 F. Supp. 3d 166, 167 (D.D.C. 2015) (dismissing suit), *aff'd*, 694 F. App'x 1 (D.C. Cir. 2017); *Lempert v. Rice*, 956 F. Supp. 2d 17, 21 (D.D.C. 2013) (dismissing suit against U.N.); *Hudes v. Aetna Life Ins. Co.*, 806 F. Supp. 2d 180, 196 (D.D.C. 2011) (dismissing suit), *aff'd*, 493 F. App'x 107 (D.C. Cir. 2012); *Sampaio v. Inter-Am. Dev. Bank*, 806 F. Supp. 2d 238, 238 (D.D.C. 2011) (dismissing suit), *aff'd*, 468 F. App'x 10 (D.C. Cir. 2012); *Sadikoğlu v. UNDP*, No. 11-0294, 2011 WL 4953994, at *1 (S.D.N.Y. Oct. 14, 2011) (dismissing suit); *In re Kaiser Grp. Int'l, Inc.*, 730 F. Supp. 2d 247, 253 (D.D.C. 2010) (quashing subpoena); *Nicol v. U.N. Missions*, No. 09-1800, 2009 WL 2370179, at *1 (E.D. Pa. July 30, 2009) (dismissing suit); *Nyambal v. IMF*, 772 F.3d 277, 278 (D.C. Cir. 2014) (dismissing suit); *Brzak v. U.N.*, 551 F. Supp. 2d 313, 314 (S.D.N.Y. 2008) (dismissing suit), *aff'd*, 597 F.3d 107 (2d Cir. 2010); *do Rosario Veiga v. WMO*, 568 F. Supp. 2d 367, 376 (S.D.N.Y. 2008) (dismissing suit), *aff'd*, 368 F. App'x 189 (2d Cir. 2010); *Vila v. Inter-Am. Inv. Corp.*, 536 F. Supp. 2d 41, 46-51 (D.D.C. 2008) (dismissing in part suit against IIC); *Price v. Unisea, Inc.*, 289 P.3d 914, 916 (Alaska 2012) (affirming dismissal).

rely on the immunity conferred by the IOIA. Pet. 2-3; *see, e.g.*, Pet. 19 (citing *Polak v. IMF*, 657 F. Supp. 2d 116 (D.D.C. 2009)). Like the U.N. and the IMF, IFC also enjoys such immunities under the IFC Articles. By contrast, because the United States was not a member of the international organization at issue in *OSS Nokalva*, the European Space Agency, there was no treaty at issue in that case. *See* H.R. Rep. No. 89-1099, at 2 (1965) (stating that 22 U.S.C. § 288f–1 was necessary "because the United States is not a member" of the ESA's predecessor); European Space Agency, *New Member States*, https://www.esa.int/About_Us/Welcome_to_ESA/New_Member_States (last visited Mar. 17, 2018) (listing ESA's 22 member states).

In fact, in many suits against international organizations—including those cited by Petitioners—the international organization would have been immune even if the FSIA applied, as the suit did not fall within any of the FSIA's exceptions to immunity. These include the suits cited by Petitioners involving internal employment disputes (*Smith, Sampaio, Aguado, Fazzari, Hudes*), defamation (*Dujardin*), or fraud and tortious interference (*Ashford*).[8] *See Broadbent*, 628 F.2d at 34 ("employment of civil

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[8] *See* Pet. 14 (citing, *inter alia*, *Ashford Int'l, Inc. v. World Bank Grp.*, No. 04-3822, 2006 WL 783357 (N.D. Ga. Mar. 24, 2006)); *id.* at 18-20 (citing, *inter alia*, *Smith v. World Bank Grp.*, 694 F. App'x 1 (D.C. Cir. 2017); *Sampaio v. Inter-Am. Dev. Bank*, 468 F. App'x 10 (D.C. Cir. 2012); *Aguado v. Inter-Am. Dev. Bank*, 85 F. App'x 776 (D.C. Cir. 2004); *Dujardin v. Int'l Bank for Reconstruction & Dev.*, 9 F. App'x 19 (D.C. Cir. 2001); *Fazzari v. Inter-Am. Dev. Bank*, 254 F.3d 315 (D.C. Cir. 2000); *Hudes v. Aetna Life Ins. Co.*, 806 F. Supp. 2d 180, 187-89 (D.D.C. 2011)).

servants [i]s noncommercial for purposes of restrictive immunity"); 28 U.S.C. § 1605(a)(5)(B) (excluding "libel" and "slander" from noncommercial-tort exception).

It is therefore unsurprising that, in the nearly 70 years since the Executive Branch adopted the restrictive theory of foreign-state immunity, only one circuit court other than the D.C. Circuit has squarely addressed whether the IOIA incorporates post-enactment developments in foreign-state immunity. The questions presented are unlikely to recur, and any conflict created by the Third Circuit's decision is unlikely to deepen. Therefore, this Court should deny certiorari.

II. The Court Of Appeals' Construction Of The IFC's Articles Of Agreement Does Not Warrant This Court's Review

Petitioners also argue that the Court of Appeals erred in construing the IFC Articles of Agreement not to waive immunity in this suit. Pet. 24-25. That contention does not warrant this Court's review.

A. Article VI, § 3 of the IFC's Articles of Agreement states that "[a]ctions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office." Pet. App. 7a n.2. Although that language could be "read literally" to waive immunity, *id.* at 7a, the Court of Appeals correctly explained that it had long construed the materially identical provisions of other organizations' charters not to waive immunity with respect to actions that—like this one—would impair the

organization's ability to fulfill its core functions by second-guessing internal decision-making processes. Pet. App. 10a; *accord Osseiran v. IFC*, 552 F.3d 836, 840 (D.C. Cir. 2009); *Vila v. Inter-Am. Inv. Corp.*, 570 F.3d 274, 281 (D.C. Cir. 2009); *Mendaro v. World Bank*, 717 F.2d 610, 615, 620 (D.C. Cir. 1983); *Banco de Seguros del Estado v. IFC*, No. 06-2427, 2007 WL 2746808, at *5 n.8 (S.D.N.Y. Sept. 20, 2007); *In re Dinastia, L.P.*, 381 B.R. 512, 522 (S.D. Tex. 2007); *Ashford Int'l, Inc. v. World Bank Grp.*, No. 04-3822, 2006 WL 783357, at *3 (N.D. Ga. Mar. 24, 2006).

That construction gives effect to the preamble to Article VI, which states that the IFC Article's immunity and waiver provisions are intended to enable IFC "to fulfill the functions with which it is entrusted." IFC Articles, art. VI § 1; *Mendaro*, 717 F.2d at 617. As the Court of Appeals correctly recognized, construing IFC's charter to permit suit in the circumstances presented here would vitiate its ability to perform its functions. If IFC were routinely subject to suit by individuals who are not parties to any contract with IFC, but who are allegedly affected by projects funded by IFC, "every loan the IFC makes to fund projects in developing countries could be the subject of the suit in Washington." Pet. App. 11a. Indeed, Petitioners' claims urge the court to decide issues such as when IFC should press on environmental covenants in lending agreements, what remedial action IFC should require from borrowers, and when IFC should cancel a lending agreement altogether. As the District Court held and the Court of Appeals affirmed, Petitioners' suit "focus[es] on IFC's internal decision-making processes," thereby "demand[ing] . . . judicial scrutiny

of the IFC's discretion to select and administer its programs." Pet. App. 33a (internal quotation marks and brackets omitted); *id.* at 10a (Petitioners' suit seeks to challenge IFC's core "policy discretion," by second-guessing the manner in which IFC conducted its relationships with the parties with whom it contracted).

The Court of Appeals' construction is also consistent with the Executive Branch's interpretation of the identical language contained in the World Bank's charter. Because IFC's charter was modeled on the World Bank's charter, the Executive's understanding of the Bank's Articles of Agreement is highly relevant here. *See* Executive Directors of the International Bank for Reconstruction and Development, *Explanatory Memorandum on the Proposed Articles of Agreement of the International Finance Corporation* at 3 (1955), http://bit.ly/2BJlkUR. The Executive Branch has explained that although "[t]he language of the Article does not specify the exact scope of actions which may properly be brought against the Bank[,] . . . at the time the Articles of Agreement were negotiated, Article VII(3) was intended as a limited waiver of immunity specifically to permit suits by private lenders against the Bank in connection with the Bank's issuance of securities." Letter from Roberts B. Owen, Legal Adviser, Dep't of State, to Leroy D. Clark, Gen. Counsel, EEOC (June 24, 1980), in Marian L. Nash, Contemporary Practice of the United States Relating to International Law, 74 Am. J. Int'l L. 917, 918 (1980). The waiver "was not designed (and should not now be construed) to subject the Bank to the full range of our domestic jurisdiction

or to expose the Bank's internal personnel and administrative actions to review by our courts." *Id.*

B. Petitioners do not contend that the Court of Appeals' construction of IFC's Articles of Agreement conflicts with that of any other court of appeals. Instead, Petitioners simply argue that the court erred. But the narrow question whether the court correctly construed IFC's charter does not warrant this Court's review.

In fact, this case would be a poor vehicle to adjudicate Petitioners' arguments about IFC's Articles. Petitioners challenge (Pet. 26) the Court of Appeals' statement that, as a general matter, IFC's Articles of Agreement should be construed to allow suits against IFC in commercial suits arising out of "business relations with outside companies" where the counterparty would not engage in the transaction if it expected IFC to be immune. *See* Pet. App. 9a; *Mendaro*, 717 F.2d at 618. But that general statement was not dispositive in this case for the reasons stated above: the Court of Appeals held that Petitioners' suit improperly challenged IFC's "internal review process" and its "core" policy decisions with respect to its "stated mission." Pet. App. 11a. Subjecting IFC to such scrutiny by U.S. courts risks "varied effects being given in different countries" to the work of international organizations, which "would interfere seriously with the[ir] necessary independence." Privileges and Immunities, 13 Whiteman Digest, ch. 38, § 5, at 47 (quoting Yuen-Li Liang, *The Legal Status of the United Nations in the United States*, 2 Int'l L. Q. 577, 584 (1948)).

III. This Court's Review Is Unwarranted For The Additional Reason That Petitioners Would Not Benefit From A Ruling In Their Favor

A. *Commercial Activity.* Even if the FSIA's commercial-activity exception applied here, IFC would still be entitled to immunity, as Petitioners' claims do not fall within the exception. *But cf.* Pet. 20.

Petitioners contend (Pet. 20) that their suit falls within the commercial-activity exception because it is "based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2). To take advantage of either prong of the commercial-activity exception, Petitioners must establish that the "gravamen" of their claims—that is, the core alleged wrongful acts that caused their injury—is either a commercial activity of IFC in the United States, or an act in the United States in connection with commercial activity elsewhere. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395 (2015) (even if a defendant's actions "led to the conduct that eventually injured" the plaintiffs, the immunity exception would not be satisfied if the actions "were not the *particular* conduct upon which their suit was based") (emphasis added) (internal quotation marks omitted).

Here, the "gravamen" of Petitioners' complaint is clearly the construction and operation of CGPL's plant in India. That is the conduct that allegedly injured them. The only conduct that Petitioners allege IFC "performed in the United States" (28

U.S.C. § 1605(a)(2)) was its decision to disburse funds before CGPL was allegedly out of compliance, and IFC's participation in the CAO proceedings *after* Petitioners were already harmed. *See* 1 D.C. Cir. JA0058 (Compl. ¶¶ 197-99) (citing "IFC's responses to allegations of harm caused"). Even if IFC's disbursement of funds, as alleged, supposedly "led to the conduct that eventually injured" Petitioners (*OBB*, 136 S. Ct. at 395), there was nothing wrongful about the disbursement itself, absent the subsequent construction and operation of the plant in India. Thus, whether IOIA immunity is absolute or subject to the FSIA's exceptions is ultimately irrelevant because either theory is "sufficient to shield the organization from lawsuit on the basis of acts involved here." *Broadbent*, 628 F.2d at 32-33; *see also* Brief for the United States as Amicus Curiae at 9 n.2, *Georges v. U.N.*, 834 F.3d 88 (2d Cir. 2016) (No. 15-455), ECF No. 199 (arguing same).

B. *Forum Non Conveniens.* Even if IFC lacked immunity here, Petitioners' suit would be subject to dismissal on *forum-non-conveniens* grounds. *Sinochem Int'l Co. v. Malay Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007). IFC moved to dismiss on that ground, but the District Court did not address the issue. Pet. App. 28a. Petitioners did not rebut IFC's assertion that the private- and public-interest factors favor dismissal because most of the proof and parties are located in India, which has the greater interest in applying its law to this case. Nor did they establish that India's National Green Tribunal is not an adequate forum in which to bring cases seeking enforcement of legal rights related to the environment in India. Thus, even if this Court were

to rule in Petitioners' favor with respect to immunity, the District Court would dismiss the case on *forum-non-conveniens* grounds on remand.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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No. 17-1011

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, et al.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the D.C. Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

I. This Court should resolve whether the immunity the IOIA affords to international organizations tracks the FSIA 1

II. Even apart from the question whether the IOIA tracks the FSIA's immunity rules, this Court's review is warranted 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Atkinson v. Inter-American Development Bank,
156 F.3d 1335 (D.C. Cir. 1998) 2, 6

Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC,
813 F.3d 98 (2d Cir. 2016) 7

Cutter v. Wilkinson,
544 U.S. 709 (2005) 8

Devlin v. United States,
352 F.3d 525 (2d Cir. 2003) 5

El Encanto, Inc. v. Hatch Chile Co.,
825 F.3d 1161 (10th Cir. 2016) 4

El-Hadad v. United Arab Emirates,
496 F.3d 658 (D.C. Cir. 2007) 4

Kato v. Ishihara,
360 F.3d 106 (2d Cir. 2004) 4

Mendaro v. World Bank,
717 F.2d 610 (D.C. Cir. 1983) 11, 12

Nyambal v. International Monetary Fund,
772 F.3d 277 (D.C. Cir. 2014), *cert. denied*,
135 S. Ct. 2857 (2015) 8

OBB Personenverkehr AG v. Sachs,
136 S. Ct. 390 (2015) 8

OSS Nokalva, Inc. v. European Space Agency,
617 F.3d 756 (3d Cir. 2010) 2

Piper Aircraft Co. v. Reyno,
454 U.S. 235 (1981) 9

Republic of Austria v. Altmann,
541 U.S. 677 (2004) 9, 10

Republic of Iraq v. Beaty,
556 U.S. 848 (2009) 10

Russello v. United States,
464 U.S. 16 (1983) 6

Samantar v. Yousuf,
560 U.S. 305 (2010) 7

Statutes

Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891, 28 U.S.C. §§ 1602-1611 (1976) ..... *passim*

International Organizations Immunities Act, Pub. L. No. 79-291, 59 Stat. 669, 22 U.S.C. § 288 *et seq.* (1945) ..... *passim*

22 U.S.C. § 288 5
22 U.S.C. § 288a(b) 1, 6, 7, 11
22 U.S.C. § 288d 6
22 U.S.C. § 288f 6

Rules and Regulations

Exec. Order No. 13,524, 74 Fed. Reg. 67,803 (Dec. 16, 2009) 5

Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962) 6

Other Authority

Ministry of External Affairs, Notification, 2016, Gazette of India, pt. II sec. 3(ii) (July 18, 2016) 9

REPLY BRIEF FOR PETITIONERS

Faced with a statutory provision that gives international organizations the "same immunity" as foreign governments, 22 U.S.C. § 288a(b), the IFC urges this Court to deny certiorari on the ground that "[f]undamentally different" principles should govern "the immunities of international organizations and foreign states," BIO 14; *see also id.* 2, 22-24. To say the text of the International Organizations Immunities Act (IOIA) directly refutes the IFC's argument is putting it mildly. The IFC's other arguments in defense of the D.C. Circuit's absolute-immunity rule likewise crumble on inspection.

But the case for certiorari here goes well beyond the fact that the D.C. Circuit's construction of the IOIA is wrong. The Third Circuit has squarely rejected the D.C. Circuit's absolute-immunity rule. And the IFC cannot seriously deny that the Executive Branch—whose views are particularly important with respect to international law issues—disagrees with it as well. Under these circumstances, it is critical to resolve whether international organizations should truly be allowed to operate beyond the law's reach. As part of that review, this Court should also consider the D.C. Circuit's judicially created limit on organizations' waivers of immunity—an additional, related matter that has tied the court of appeals up in knots and hampered the proper administration of the IOIA.

I. This Court should resolve whether the immunity the IOIA affords to international organizations tracks the FSIA.

1. The IFC cannot dispute that the Third and D.C. Circuits (and Supreme Court of Alaska) disagree over

whether the IOIA cloaks international organizations with absolute immunity. Contrary to the IFC's contentions (BIO 3, 26-29), this disagreement warrants this Court's attention.

a. For starters, the D.C. Circuit's stance on the question presented is particularly significant—and particularly troublesome. Cases involving the IOIA disproportionately arise within that circuit because most international organizations are located there. Yet the D.C. Circuit's absolute-immunity rule is at loggerheads not only with the Third Circuit's position on the issue, but also with the long-established position of the U.S. State Department. *See OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756 (3d Cir. 2010); Pet. 12-13, 22-24.

The IFC suggests that the Government's position is not due the usual weight because the Government has not reiterated it since filing an amicus curiae brief in 1980. BIO 25. In fact, the State Department reaffirmed the Government's position in 1992. Pet. 12-13 n.4. And the IFC offers no basis for believing the Government's position has changed since then.

b. The IFC next posits that suits against international organizations are "uncommon." BIO 26-27. But simply tallying reported decisions "[o]ver the past decade," *id.* 26, as the IFC does, is hardly an adequate proxy for the significance of whether international organizations are absolutely immune from suit. The D.C. Circuit established its absolute-immunity rule over a decade ago in *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998), deterring parties since then from bringing claims in Washington, D.C. Even so, cases implicating the immunity issue here continue to be

brought in that jurisdiction. *See* Pet. 19 (citing cases). Lawsuits against international organizations likewise have been brought in recent years in several other places. *See id.* 14 (citing cases).

Bean counting aside, the immunity issue presented here is exceptionally important regardless of how often it arises in court cases. International organizations affect matters ranging from international business to natural resource management to human health and safety. *See* Pet. 2. Lower courts should not be able to place the commercial activities of such organizations beyond the reach of the law—regardless of how egregious or harmful the organizations' acts may be—without this Court's considering the question.

c. Nor is the IFC correct in suggesting that construing the IOIA's "same immunity" provision to track the FSIA would rarely "have any practical impact" on the outcome of immunity analyses. BIO 27. To support this claim, the IFC points to two organizations—the United Nations and the International Monetary Fund (IMF)—that enjoy broad immunity under their founding treaties. *Id.* 27-28. But those organizations are exceptional. The charters of most international organizations, including the IFC, do not establish immunity beyond what the disputed IOIA provision confers.[1]

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[1] The IFC asserts at one point that its charter gives it immunities comparable to the United Nations and IMF. BIO 28. This is incorrect. The Articles of Agreement for the latter organizations protect them from every form of legal process. Pet. 2-3. By contrast, with the one exception of suits by member states, the IFC's Articles do not purport to confer any immunity. *Id.* 7-8; Pet. App. 2a, 23a.

The IFC's claim (BIO 28) that applying the FSIA in this context would still preclude most suits against international organizations is similarly inaccurate. As the IFC itself acknowledges, many international organizations engage almost exclusively in commercial activity. *Id.* 22. That being so, the IFC is wrong to suggest (*id.* 28-29) that employment suits against such organizations would never satisfy the FSIA's commercial activity exception. *See El-Hadad v. United Arab Emirates*, 496 F.3d 658, 663-68 (D.C. Cir. 2007) (explaining circumstances under which employment claims can satisfy exception); *Kato v. Ishihara*, 360 F.3d 106, 111-14 (2d Cir. 2004) (same). And that is to say nothing of suits like this—or suits involving other plainly commercial matters such as contracts, corporate bankruptcy, or securities fraud. *See* Pet. 19.

2. The significance of the immunity issue here and the intractable split over the meaning of the IOIA call for this Court's intervention, even without more. But the IFC's arguments on the merits confirm the need for review.

a. The plain text of the IOIA compels the conclusion that the statute incorporates the law of foreign sovereign immunity as it exists today. Indeed, the IFC does not dispute the general rule that when the text of a federal statute explicitly refers to another body of law, the statute incorporates that law on an evolving basis. Pet. 12; *see also El Encanto, Inc. v. Hatch Chile Co.*, 825 F.3d 1161, 1164 (10th Cir. 2016) (Gorsuch, J.) (the "plain language" of a statute referencing the Federal Rules of Civil Procedure incorporates the Rules as they exist at the time of suit, not at the time of the statute's enactment);

Devlin v. United States, 352 F.3d 525, 530, 532 (2d Cir. 2003) (Federal Tort Claims Act provision rendering United States liable "in accordance with the law of the place where the act or omission occurred" ties the Government's liability to the "evolving tort law of the several states").

The IFC nevertheless maintains that the reference canon is overcome here by "other evidence of congressional intent." BIO 17. Both of its arguments in this respect are unconvincing.

First, the IOIA's presidential authority provision—which allows the President to "withhold or withdraw from any [international] organization" its privileges and immunities, 22 U.S.C. § 288—does not shed any light on whether the statute's "same immunity" provision freezes sovereign immunity law as of 1945. The presidential authority to "withdraw" an immunity simply permits discrete, organization-specific exemptions to the IOIA's various default immunity rules. As the text of Section 288 makes clear, the provision has nothing to do with setting the default rules for *all* organizations. *See* Pet. 16.

Indeed, no President has ever used the authority in Section 288, as the IFC proposes, to alter "the scope of immunity accorded international organizations" across the board, BIO 16-17. Rather, the President has used Section 288 only to adjust specific privileges and immunities for named organizations.[2]

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[2] *See, e.g.*, Exec. Order No. 13,524, 74 Fed. Reg. 67,803 (Dec. 16, 2009) (expanding Interpol's privileges and immunities); Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962) (designating and withholding certain immunities

Second, the IFC observes that "[s]everal of the IOIA's provisions distinguish between international organizations and foreign states." BIO 19 (citing 22 U.S.C. §§ 288d, 288f). But these other provisions refute rather than support the IFC's position. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). That being so, the provisions that the IFC cites show that Congress knew in the IOIA how to distinguish between international organizations and foreign states, and it chose not to do so in the provision setting default rules for immunity from suit.

b. The IFC's policy arguments likewise run smack into the text of the IOIA. Extrapolating from a couple of secondary sources and spinning a theory even the D.C. Circuit did not voice below or in *Atkinson*, the IFC argues that "[f]undamentally different" principles should animate foreign sovereign immunity and international organization immunity. BIO 14, 22-24. In crafting the IOIA, however, Congress reached the opposite conclusion with respect to immunity from suit—namely, that the "same" immunity rules should govern both types of entities. 22 U.S.C. § 288a(b). And that conclusion makes sense. International organizations are simply collections of sovereign states. So they should not be

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from the Inter-American Tropical Tuna Commission, the Great Lakes Fishery Commission, and the International Pacific Halibut Commission).

immune when states themselves would not be entitled to immunity.

The IFC also notes that the FSIA "never was intended to govern . . . the immunity of foreign officials." BIO 24 (citing *Samantar v. Yousuf*, 560 U.S. 305 (2010)). This is irrelevant. The IOIA directs that international organizations shall enjoy the same immunity as "foreign governments." 22 U.S.C. § 288a(b). The immunity rules governing foreign *officials* are beside the point.

The IFC lastly maintains that incorporating the FSIA's approach to immunity into the IOIA would produce "anomalous results," in that subjecting international organizations to suit for their commercial activities would affect some international organizations more than others. BIO 21-22. But that is not odd at all. Under the FSIA, agencies of foreign states that engage in predominately commercial activity are more commonly subject to suit than those that are not. The IOIA simply aligns international organization immunity with this existing regime.

The real anomaly would be granting immunity for the commercial activities of international organizations and not others similarly situated. Development banks such as the IFC, for instance, often make loans in tandem with state-owned and private banks, which are amenable to suit for their commercial wrongs, *see Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 102, 117 (2d Cir. 2016) (sovereign wealth fund not immune under FSIA from securities fraud claim). Against this backdrop, insulating international organizations' commercial misdeeds

from suit would be inconsistent with how their peers and business partners are treated for the same acts.

3. The IFC contends that "petitioners would not benefit from a ruling in their favor" because it could ultimately prevail in this litigation for reasons unrelated to the IOIA. BIO 33 (capitalization altered). The district court and the court of appeals, however, addressed "only IFC's threshold immunity argument," without reaching any of its other arguments for dismissal. Pet. 8; Pet. App. 23a-24a, 28a. And this Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Accordingly, any other defenses that the IFC might wish to press in the future should not dissuade this Court from resolving the IOIA issue presented here.[3]

Regardless, the IFC's alternative defenses lack merit. For the first time in this litigation, the IFC asserts that petitioners' claims do not fit within the FSIA's commercial activity exception. BIO 33. But the IFC's analogy to *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395 (2015), fails. The commercial activity exception was inapplicable in *Sachs* because the tortious conduct occurred entirely overseas. *Id.* at 396. Here, by contrast, petitioners' claims are based upon acts the IFC undertook at its Washington, D.C., headquarters: the IFC's decision to fund a dangerous project without proper

[3] The procedural posture here thus stands in stark contrast to *Nyambal v. International Monetary Fund*, 772 F.3d 277 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 2857 (2015), where the D.C. Circuit ruled for the defendant for reasons independent of the IOIA, and the petitioner did not challenge that alternative holding in its petition to this Court. *See* Pet. 15 n.5.

safeguards, its "inadequate supervision" of that project, and its continued disbursement of funds despite knowledge that serious harms were materializing. Pet. 6.

The doctrine of *forum non conveniens* could not require dismissal of petitioners' suit either. *Contra* BIO 34. That doctrine does not apply when the alternative forum the defendant proposes provides "no remedy at all." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981). Here, no remedy is available in the IFC's proposed alternative forum because the Indian government has recently given the IFC special immunity. *See* Ministry of External Affairs, Notification, 2016, Gazette of India, pt. II sec. 3(ii) (July 18, 2016).

II. Even apart from the question whether the IOIA tracks the FSIA's immunity rules, this Court's review is warranted.

If the D.C. Circuit proved somehow to be correct that the IOIA's "same immunity" provision locks in the law that governed foreign states in 1945, this Court's further guidance would be needed. The D.C. Circuit has adopted two important IOIA-specific rules that have created fits for litigants and courts alike.

1. As the IFC's BIO reveals, the D.C. Circuit has made a hash of the immunity rules that governed in 1945. This Court has repeatedly held that the law at that time required courts to defer to the Executive Branch's stance as to whether a foreign state was entitled to immunity. *See Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004); Pet. 21-22. The IFC also implicitly acknowledges, and pre-1945 case

law confirms, that the Executive Branch made those determinations on a case-by-case basis. BIO 15-16 n.2; *see also Republic of Iraq v. Beaty*, 556 U.S. 848, 857 (2009); Pet. 23-24. In its efforts to harmonize *Altmann* with the D.C. Circuit's holding, however, the IFC argues that the IOIA's "same immunity" provision requires courts to defer to the Executive's views as of "the time of the IOIA's enactment," instead of at the time a lawsuit is filed. BIO 15.

The IFC's argument fails fully to account for how *Altmann* explained immunity law worked in 1945. Immunity then, as now, reflected "current political realities," requiring courts to defer to "the most recent [political branch] decision." *Altmann*, 541 U.S. at 696; *see also* Pet. 23-24 (citing pre-1945 case law). So a court today applying the law of 1945 would have to look to the political branches' *modern* position on immunity. That would be a readily administrable and sensible inquiry that accounts for the purposes for deferring to the Executive in the first place. And it would dictate, per the Government's expressions in the FSIA and the Tate Letter, that foreign states (and thus international organizations) are not immune from suit based on commercial activities. *See* Pet. 22.

By contrast, the IFC's backward-looking approach to the IOIA's "same immunity" provision would require courts today to imagine whether President Truman's administration would have wanted the particular defendant to enjoy immunity. *See* Pet. App. 6a. This leaves lower courts with an inherently speculative task, *Altmann*, 541 U.S. at 713 (Breyer, J., concurring)—and one that seems increasingly foolish as time goes by. This Court should not countenance such a misguided regime,

especially insofar as it grants organizations immunity under circumstances that U.S. law has denied to foreign states for over sixty-five years.

2. The D.C. Circuit's approach to waivers under the IOIA also merits this Court's review.

a. The IOIA provides in unqualified terms that organizations "may expressly waive their immunity." 22 U.S.C. § 288a(b). Consequently, the D.C. Circuit's recognition that "read literally," the IFC's charter includes a "categorical waiver" of immunity from suit, Pet. App. 7a, should have been the end of the matter. But the D.C. Circuit nevertheless declined to enforce the waiver because of its rule requiring not only a written waiver of immunity but also a showing that the type of suit at issue "would benefit the organization over the long term." *Id.* (citation omitted); *see also Mendaro v. World Bank*, 717 F.2d 610, 617 (D.C. Cir. 1983) (first enunciating this test).

As the D.C. Circuit itself recognized here, its "corresponding benefit" test has devolved into a "doctrinal tangle." Pet. App. 21a (Pillard, J., concurring); *see also id.* 8a-11a (majority opinion recognizing that the test is "a bit strange" and "something of a misnomer" because a claim such as petitioners' "in some sense can be thought of as a 'benefit'"). The IFC tries to defend the test—and the outcome it produced here—on the ground that a waiver of immunity should not be enforced where it "would vitiate [an organization's] ability to perform its functions." BIO 30. But the fact that the IFC even offers this defense only reinforces how freewheeling and "amorphous" the D.C. Circuit's waiver jurisprudence has become. Pet. App. 21a (Pillard, J., concurring).

At any rate, the IFC's contention that lawsuits like this would stymie its operations is transparently untrue. All other lending institutions—whether privately or publicly owned—are subject to suit for commercial malfeasance. Yet they remain able to perform their core functions.

b. The IFC contends that this case is an unsuitable vehicle to address the IOIA's waiver provision because the D.C. Circuit characterized petitioners' claims as "challeng[ing the] IFC's 'internal review process' and its 'core' policy decisions." BIO 32 (quoting Pet. App. 10a-11a). But this is circular. The D.C. Circuit offered those characterizations in service of applying the very "corresponding benefit" test that petitioners maintain is wrong. *See Mendaro*, 717 F.2d at 617-18. This Court should grant certiorari to resolve whether petitioners are correct that courts must enforce waivers without applying that judicially created standard.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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BRIEF OF INTERNATIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE D.C. CIRCUIT'S INTERPRETATION OF THE IOIA IS INCORRECT BECAUSE IT FAILS TO EFFECTUATE A CLEAR WAIVER OF IMMUNITY 5

II. THE D.C. CIRCUIT FAILS TO RECOGNIZE THAT INTERNATIONAL ORGANIZATIONS ARE SUBJECT TO THE PRINCIPLE OF FUNCTIONAL IMMUNITY 9

III. THE D.C. CIRCUIT'S DECISION, WHICH GRANTS IMMUNITY TO THE IFC, IS CONTRARY TO THE REMEDIAL PRINCIPLES OF INTERNATIONAL LAW, INCLUDING THE RIGHT TO A REMEDY 16

CONCLUSION 21

ADDENDUM: LIST OF *AMICI CURIAE* A-1

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Abbott v. Abbott
560 U.S. 1 (2010) 13

Bolivarian Republic of Venezuela v. Helmerich & Payne Intern. Drilling Co.,
137 S. Ct. 1312 (2017) 8

Jam v. International Finance Corp.,
860 F.3d 703 (D.C. Cir. 2017) ..... *passim*

Murray v. Schooner Charming Betsy,
6 U.S. (2 Cranch) (1804) 5

OSS Nokalva, Inc. v. European Space Agency,
617 F.3d 756 (3d Cir. 2010). 4, 8

Sale v. Haitian Ctrs. Council,
205 U.S. 155 (1993) 13

Weinberger v. Rossi,
456 U.S. 25 (1982) 13

FEDERAL STATUTES AND RULES

International Organizations Immunities Act,
Pub. L. No. 789-291,
59 Stat. 669 (1945) ..... *passim*

22 U.S.C. § 288 ..... *passim*

28 U.S.C. § 1602 8

28 U.S.C. § 1604 8

28 U.S.C. § 1605 8

TREATIES AND INTERNATIONAL AGREEMENTS

American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 18

Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 521 15

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 18-19

IFC Articles of Agreement, May 25, 1955, 264 U.N.T.S. 118 ..... *passim*

International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 17

U.N. Human Rights Comm., General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (Mar. 29, 2004) 17-18

Universal Declaration of Human Rights, 8 G.A. Res 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) 16-17

Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 13

INTERNATIONAL AUTHORITIES

Durand & Ugarte, Inter-Am. Ct. H.R. (ser. C) No. 89 (Dec. 3, 2001) 18

Factory at Chorzów (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 1 (Sept. 13) 16

Garrido & Baigorria, Inter-Am. Ct. H.R. (ser. C) No. 39 (Aug. 27, 1998) 18

International Law Commission, Draft Articles on the Responsibility of International Organizations, with Commentaries (2011) 19-20

Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 I.C.J. Reports 73 (Dec. 20) 9, 16

Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. Reports 174 (Apr. 11). 9, 10, 16

Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 7, (July 21, 1989) 18

Waite & Kennedy v. Germany, App. No. 26083/94, 30 Eur. H.R. Rep. 261 (1999) 19

OTHER AUTHORITIES

August Reinisch, *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals*, 7 Chinese J. Int'l L. 285 (2008) 15

August Reinisch & Jakob Wurm, *International Financial Institutions before National Courts*, *in* Immunity of International Organizations 103 (Niels Blokker & Nico Schrijver eds., 2015) .. 11

Carson Young, *The Limits of International Organization Immunity*, 95 Tex. L. Rev. 889 (2017) 14

Daniel D. Bradlow, *Using a Shield as a Sword: Are International Organizations Abusing Their Immunity?*, 31 Temple Int'l & Comp. L. J. 45 (2017) 20-21

Daniel D. Bradlow & David B. Hunter, *Conclusion: The Future of International Law and International Financial Institutions*, *in* International Financial Institutions and International Law 387 (Daniel D. Bradlow & David B. Hunter eds., 2010) 9

Dinah Shelton, Remedies in International Human Rights Law (3d ed. 2015) 16

Frederic Megret & Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 Hum. Rts. Q. 314 (2003) 15

Hazel Fox & Philippa Webb, The Law of State Immunity (3d ed. 2016) ..... *passim*

International Finance Corporation, IFC: The First Six Decades (2017) 6, 13

James Crawford, The International Law Commission's Articles on State Responsibility (2002). 19-20

Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 Chi. J. Int'l L. (2016) 14

Marina Feldman, et al., *Annex VIII: International Finance Corporation (IFC), in* The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary 805 (August Reinisch ed., 2016)..... 6

Michael Wood, *Do International Organizations Enjoy Immunity under Customary International Law, in Immunity of* International Organizations 29 (Niels Blokker & Nico Schrijver eds., 2015)..... 10

Niels Blokker, *International Organizations: The Untouchables, in* Immunity of International Organizations 1 (Niels Blokker & Nico Schrijver eds., 2015)..... 10-11

Oxfam, The Suffering of Others (Apr. 2015)..... 3

Restatement (Third) of Foreign Relations Law § 115 (1987)..... 5

Steven Herz, *Rethinking International Financial Institution Immunity, in* International Financial Institutions and International Law (Daniel D. Bradlow & David B. Hunter eds., 2010) 14

INTEREST OF *AMICI CURIAE*

This Brief of *Amici Curiae* is respectfully submitted pursuant to Supreme Court Rule 37(2).[1] It is filed in support of the Petition for Writ of Certiorari.

Amici are legal experts in the fields of international law and human rights.[2] They teach and have written extensively on these subjects. While they pursue a wide variety of legal interests, they all share a deep commitment to the rule of law, respect for human rights, and the principles of accountability for perpetrators and redress for victims.

Amici recognize that international law no longer accepts claims of absolute immunity by states or international organizations in all cases. Instead, immunity is conditioned on various factors, including whether the relevant actor has waived immunity, the nature of the underlying claims, and

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. Counsel of Record for all parties were notified by *Amici* of their intent to file more than 10 days prior to the due date. In addition, Petitioners consented to *amicus* submissions through a blanket consent filed with the Clerk of the Court. Respondent also consented to the filing of this Brief of *Amici Curiae*.

[2] A list of the *Amici* appears in the Addendum.

the principle of functional immunity. Moreover, a grant of absolute immunity is contrary to the remedial principles of international law, which include accountability for tortfeasors and the right to a remedy for victims. For these reasons, *Amici* are deeply concerned with the D.C. Circuit's decision in *Jam v. International Finance Corp.*

Amici would like to provide the Court with their perspective on these issues. They believe this submission will assist the Court in its deliberations.

SUMMARY OF ARGUMENT

In *Jam v. International Finance Corp.*, 860 F.3d 703 (D.C. Cir. 2017), the D.C. Circuit held the International Finance Corporation ("IFC"), which is headquartered in Washington, D.C., was immune from civil liability in a case arising out of an IFC-funded project. The IFC loan of $450 million was made to a private company for the construction and operation of a power plant in India. According to Petitioners, the IFC failed to comply with its funding agreement as well as its own internal policies to prevent social and environmental damage. While the IFC "retained supervisory authority and could revoke financial support of the project," it failed to do so. *Id.* at 704. Petitioners allege the IFC's acts and omissions resulted in their community suffering catastrophic

environmental harm, thereby affecting their lives and livelihood.[3]

In considering the IFC's purported claim of absolute immunity, the D.C. Circuit incorrectly interpreted and applied the International Organizations Immunities Act ("IOIA"), Pub. L. No. 789-291, 59 Stat. 669 (1945) (codified as amended 22 U.S.C. §§ 288 *et seq*). The IOIA grants international organizations the same immunity "as is enjoyed by foreign governments." *Id.* § 288a(b). The IOIA also carves out a significant exception. Immunity applies "except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." *Id.* Notwithstanding these provisions, the D.C. Circuit offered a puzzling interpretation that treats organizational immunity as a static principle while acknowledging that state immunity has evolved since the IOIA was adopted in 1945.[4] *Jam*, 860 F.3d at 705. As a result, the D.C. Circuit disregarded the IFC's clear waiver of immunity in this case.

In explaining its puzzling decision, the D.C. Circuit acknowledged it was bound by circuit precedent regarding the scope of immunity possessed by international organizations. But, as

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[3] For similar concerns regarding the human costs arising out of IFC projects, see Oxfam, *The Suffering of Others* (Apr. 2015).

[4] The limitations of the D.C. Circuit's interpretation are fully addressed in the Petition for Writ of Certiorari.

Judge Pillard noted in her concurring opinion, the D.C. Circuit's decisions "have left the law of international organizations' immunity in a perplexing state" and that they were "wrongly decided." *Id.* at 708 (Pillard, J., concurring).

This Court should grant certiorari and reverse the D.C. Circuit's decision for three reasons.[5] First, the IFC's governing statute clearly waives the IFC's immunity from civil process. The D.C. Circuit disregards the plain language of the IOIA and incorrectly interprets the statute, thereby absolving the IFC from its clear and firm duty to respond to this action. Second, international organizations are subject to the principle of functional immunity, which is a more limited form of immunity. Third, immunity claims must be assessed in light of the remedial principles of international law, including the right to a remedy. In sum, the D.C. Circuit's decision affords the IFC impunity for its wrongful acts, which is contrary to the entire architecture of international law.

As this Court considers the question of immunity and the applicable IOIA language, it should consider the well-known canon of statutory construction that federal law must not be interpreted in a manner that conflicts with

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[5] There is a circuit split between the D.C. Circuit and the Third Circuit on the question of immunity for international organizations. *See OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756 (3d Cir. 2010).

international law if any other construction is fairly possible. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804); *see also* Restatement (Third) of Foreign Relations Law § 114 (1987). This doctrine does not require courts to use international law to override domestic law; rather, courts are urged to harmonize domestic and international law whenever possible. This canon of statutory construction is particularly important in this case, where a federal statute requires courts to reference the IFC's constitutive treaty and consider the immunity principles that apply to international financial institutions.

For these reasons, this Court should grant the petition for certiorari and reverse the D.C. Circuit's decision.

ARGUMENT

The D.C. Circuit's decision, which exempts the IFC from civil process, misconstrues the IOIA, has no basis in the IFC's governing statute, and is contrary to international law.

I. THE D.C. CIRCUIT'S INTERPRETATION OF THE IOIA IS INCORRECT BECAUSE IT FAILS TO EFFECTUATE A CLEAR WAIVER OF IMMUNITY.

The IOIA governs the immunity of international organizations operating in the United States. While it grants these organizations immunity, it also includes a significant exception. Immunity applies

"except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. § 288a(b).

The IFC was established in 1956 and is a member of the World Bank Group.[6] *See generally* International Finance Corporation, IFC: The First Six Decades (2d. ed. 2017) ("IFC: The First Six Decades"). It is a specialized agency of the United Nations although it is considered a separate international organization. Unlike other members of the World Bank Group, the IFC focuses exclusively on providing financial investments to the private sector. *Id.* at 12, 27.

The IFC's Articles of Agreement constitute its governing statute.[7] IFC Articles of Agreement, May 25, 1955, 264 U.N.T.S. 118 ("Articles of

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[6] The World Bank Group includes the International Bank for Reconstruction and Development, the International Development Association, the Multilateral Investment Guarantee Agency, the International Centre for Settlement of Investment Disputes, and the International Finance Corporation. IFC: The First Six Decades, *supra*, at 5-6.

[7] The IFC provides several forms of financial products and services, including "loans for the IFC's own account and for the account of participating financial institutions, equity and quasi-equity investments, structured finance transactions, and advisory services that support private sector development." Marina Feldman, et al., *Annex VIII: International Finance Corporation (IFC)*, *in* The Conventions on the Privileges and Immunities of the United Nations and its Specialized Agencies: A Commentary 805, 806 (August Reinisch ed., 2016).

Agreement"). Article VI establishes the IFC's status, privileges, and immunities. Specifically, Article VI(3) provides:

> Actions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members.

The plain language of Article VI(3) acknowledges the IFC may be subject to civil process. The D.C. Circuit acknowledged this in its own opinion. *Jam*, 860 F.3d at 706 ("There is no question that the IFC has waived immunity for some claims. Indeed, its charter, read literally, would seem to include a categorical waiver.").

Despite the definitive nature of the IFC's waiver in its governing statute, the D.C. Circuit chose to rely on circuit precedent for a contrary interpretation even though it recognized its interpretation was "a bit strange." *Id.* at 707. This was clear error.

It is instructive to consider how the D.C. Circuit's approach to organizational immunity in the IOIA compares to the more limited concept of sovereign immunity. In the United States, the Foreign Sovereign Immunities Act ("FSIA") codifies the restrictive theory of sovereign immunity for foreign states and allows for some civil actions, including certain torts and claims arising out of

commercial activities. 28 U.S.C. §§ 1602, 1604, 1605; *see generally Bolivarian Republic of Venezuela v. Helmerich & Payne Intern. Drilling Co.*, 137 S. Ct. 1312, 1319 (2017) (FSIA "embodies basic principles of international law long followed both in the United States and elsewhere."). It would be puzzling for an international organization to receive greater protection from civil process under U.S. law than what is provided to foreign states for similar claims. *See* Hazel Fox & Philippa Webb, The Law of State Immunity 578 (3d ed. 2016) (noting the incongruity of granting absolute immunity to international organizations in comparison to the restricted immunity enjoyed by states). In fact, such an interpretation would create a perverse "incentive for foreign governments to evade legal obligations by acting through international organizations." *OSS Nokalva, Inc.*, 617 F.3d at 764.

This reason alone undermines the D.C. Circuit's puzzling approach to immunity in this case—an approach that treats organizational immunity as a static principle while acknowledging that state immunity has evolved since the IOIA was adopted in 1945. *Jam*, 860 F.3d at 705 (rejecting an evolving notion of international organizational immunity while recognizing that sovereign immunity has evolved).

II. THE D.C. CIRCUIT FAILS TO RECOGNIZE THAT INTERNATIONAL ORGANIZATIONS ARE SUBJECT TO THE PRINCIPLE OF FUNCTIONAL IMMUNITY.

The IFC is a subject of international law.[8] And, as a subject, it is "capable of possessing international rights and duties . . . ." *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. Reports 174, 179 (Apr. 11). Accordingly, the IFC has a clear obligation to comply with the substantive requirements of international law. The International Court of Justice ("ICJ") has indicated that "[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law. . . ." *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 1980 I.C.J. Reports 73, 89-90 (Dec. 20).

While international organizations are subjects of international law, there are significant distinctions between states and international

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[8] Daniel D. Bradlow & David B. Hunter, *Conclusion: The Future of International Law and International Financial Institutions*, *in* International Financial Institutions and International Law 387, 389 (Daniel D. Bradlow & David B. Hunter eds., 2010) ("[I]t is clear that the IFIs [international financial institutions], like all inter-governmental organizations, are subjects of international law. As such, their status, powers, and responsibilities are defined by the treaties that create them—in the case of the IFIs, their Articles of Agreement.").

organizations. *See Reparation for Injuries Suffered in the Service of the United Nations,* 1949 I.C.J. Reports at 180 ("Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice."). These distinctions are evident in the area of immunity.

It has long been recognized that state immunity is different from organizational immunity. Fox & Webb, *supra,* at 570-71. "[W]hile States have general powers, rights and responsibilities, international organizations' powers and responsibility are defined by their functions and purposes, as set out in their constituent instrument and as implemented in practice." [9] *Id.* at 571. The functions of the organization determine the scope of their immunity. Accordingly, the principle of functional immunity is now used to assess the immunity of international organizations. Niels Blokker, *International Organizations: The Untouchables, in* Immunity of International

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[9] Customary international law does not address the status of organizational immunity. Michael Wood, *Do International Organizations Enjoy Immunity under Customary International Law, in* Immunity of International Organizations 29 (Niels Blokker & Nico Schrijver eds., 2015). Accordingly, reliance on an organization's constitutive instrument is necessary to determine the scope of such immunity.

Organizations 1, 2 (Niels Blokker & Nico Schrijver eds., 2015).

The principle of functional immunity is even more relevant in the case of international financial institutions such as the IFC.[10] Because of their unique status, international financial institutions must waive their immunity in order to do business.

> International financial institutions . . . are in a special category: their purpose being essentially to lend and borrow, their constituent instruments contain broad waivers in favour of third party transactions in order to attract lender confidence. This waiver tends to pertain to suits by private parties, not Member States.

Fox & Webb, *supra*, at 577.

The IFC Articles of Agreement granted the IFC "full juridical personality," which included the capacity: "(i) to contract; (ii) to acquire and dispose of immovable and movable property; [and] (iii) to institute legal proceedings." Articles of Agreement, art. VI(2). To enable the IFC "to fulfill the functions with which it is entrusted," the Articles of Agreement also waived IFC immunity from civil process while keeping other institutional privileges intact. *Id.* arts. VI(1), VI(3). This is consistent with the principle of functional immunity.

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[10] *Cf.* August Reinisch & Jakob Wurm, *International Financial Institutions before National Courts*, *in* Immunity of International Organizations 103, 105 (Niels Blokker & Nico Schrijver eds., 2015).

Article VI(3) of the Articles of Agreement indicates that "[a]ctions may be brought against the Corporation . . . ." The ordinary meaning of this provision is to allow for civil process against the IFC. Article VI(3) includes one condition and one exception, neither of which preclude this case from proceeding. Actions may only be brought against the Corporation "in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service of process, or has issued or guaranteed securities." *Id.* And, no actions shall "be brought by members or persons acting for or deriving claims from members." *Id.* In sum, the IFC has waived any possible claims of immunity.

This interpretation is bolstered by the remaining provisions of Article VI, which make it abundantly clear the drafters knew how to establish immunity for selected IFC operations and personnel. For example, Section 4 provides immunity of IFC assets from seizure. Section 5 provides immunity of IFC archives. Section 8 provides for immunities and privileges of IFC officers and employees. Section 9 provides the IFC immunities from taxation. In contrast, Section 3 provides no such immunity regarding the position of the IFC itself with regard to civil process.

This plain language interpretation of the IFC's Articles of Agreement is also reinforced by the treaty's "object and purpose" and the practical

ramifications of a different interpretation.[11] The IFC is the only member of the World Bank Group that exclusively serves the private sector, and this work is performed without any government guarantees. IFC: The First Six Decades, *supra*, at 27. The IFC's purpose is "to further economic development by encouraging the growth of productive private enterprise in member countries." Articles of Agreement, art. I. To carry out this purpose, the IFC Articles of Agreement indicate the IFC shall "seek to stimulate, and to help create conditions conducive to, the flow of private capital, domestic and foreign, into productive investment in member countries." *Id.* art. I(iii).

To enable the IFC to fulfill these functions, the Articles of Agreement clarify the IFC's legal status and its amenability to civil process. Article VI(2) provides the IFC "shall possess full juridical

---

[11] Under the Vienna Convention on the Law of Treaties, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention"). U.S. courts consistently look to the Vienna Convention as an authoritative guide when interpreting international instruments and resolving potential ambiguities in treaty terms. *See Abbott v. Abbott*, 560 U.S. 1, 40 (2010) (relying on the Vienna Convention to aid in the interpretation of treaty provisions); *Sale v. Haitian Ctrs. Council*, 205 U.S. 155, 191, 194-195 (1993) (relying on the Vienna Convention as evidence of "well-settled" rules of interpretation); *Weinberger v. Rossi*, 456 U.S. 25, 30 (1982) (citing the Vienna Convention in discussing the meaning of "treaty" under international law).

personality and in, in particular, the capacity: (i) to contract; (ii) to acquire and dispose of immovable and movable property; (iii) to institute legal proceedings." In addition, Article VI(3) waives the IFC's immunity from civil process.

The IFC would simply be unable to function in financial markets if it was not amenable to civil process. Private sector actors would be unlikely to engage with an organization that could not be held accountable for its misdeeds. A regime of absolute liability would weaken respect for the rule of law and due process, thereby undermining the IFC's goal of creating conditions conducive to the flow of private capital and investment. Thus, the IFC's waiver of immunity serves the organization by supporting the rule of law, promoting accountability, and providing redress to individuals who have been harmed by its actions. *See generally* Carson Young, *The Limits of International Organization Immunity*, 95 Tex. L. Rev. 889, 905-08 (2017) (addressing the benefits that accrue through restrictive immunity); Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 Chi. J. Int'l L. 341, 362-74 (2016) (addressing the arguments against absolute immunity); Steven Herz, *Rethinking International Financial Institution Immunity*, *in* International Financial Institutions and International Law 137, 138 (Daniel D. Bradlow & David B. Hunter eds., 2010) (describing the reasons for limited immunity). The harmful consequences associated with immunity are evident in this case, which involves an alleged tort in a private-sector project.

The IFC's immunity waiver is also consistent with the Convention on the Privileges and Immunities of the Specialized Agencies, Nov. 21, 1947, 33 U.N.T.S. 521. Article IX(31) recognizes that U.N. specialized agencies have an obligation to provide "appropriate modes of settlement" for disputes arising from their contractual arrangements and for "other disputes of a private law character." *Id.* art. IX(31). The failure of a specialized agency to provide an "appropriate mode of settlement" would undermine that agency's claim to immunity.[12] By expressly waiving its immunity from civil process, the IFC fulfilled this obligation.

In sum, international organizations are governed by the principle of functional immunity. The D.C. Circuit's decision is contrary to this more restrictive theory of immunity.

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[12] *See* August Reinisch, *The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals*, 7 Chinese J. Int'l L. 285, 305 (2008) ("The notion that the jurisdictional immunity enjoyed by international organizations may depend upon the availability of 'reasonable alternative means to protect effectively' the rights of those affected by their activities . . . is increasingly accepted by a number of national courts, in particular, in Europe."). *See also* Frederic Megret & Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 Hum. Rts. Q. 314 (2003).

III. THE D.C. CIRCUIT'S DECISION, WHICH GRANTS IMMUNITY TO THE IFC, IS CONTRARY TO THE REMEDIAL PRINCIPLES OF INTERNATIONAL LAW, INCLUDING THE RIGHT TO A REMEDY.

As a subject of international law, the IFC is bound by the general rules of international law. *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. Reports at 179; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, 1980 I.C.J. Reports at 89-90. This includes the principle of *ubi ius ibi remedium*—"where there is a right, there is a remedy."

The seminal formulation of this fundamental principle comes from the 1928 holding of the Permanent Court of International Justice ("PCIJ") in the *Factory at Chorzów* case. "[I]t is a principle of international law, and even a general conception of law, that *any breach of an engagement involves an obligation to make reparation.*" *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13) (emphasis added). The remedial principles governing human rights law are heavily influenced by the *Factory at Chorzów*. *See* Dinah Shelton, Remedies in International Human Rights Law 377 (3d ed. 2015).

The right to a remedy is codified in several treaties and has now attained the status of customary international law. It was first set forth in the influential Universal Declaration of Human Rights, G.A. Res 217A (III), U.N. Doc. A/810 at 71

(Dec. 10, 1948). Article 8 provides "[e]veryone has the right to an effective remedy . . . for acts violating the fundamental rights granted him . . . .").

The International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 ("ICCPR"), which the United States has signed and ratified, obligates States Parties to provide effective remedies for violations. For example, Article 2(3) provides:

> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Id. art. 2(3).

The Human Rights Committee, which oversees States' compliance with the ICCPR, emphasizes that remedies must not just be available in theory but that "States Parties must ensure that individuals . . . have ***accessible and effective remedies*** to vindicate" their rights. U.N. Human Rights Comm., General Comment No. 31 on the

Nature of the General Legal Obligation Imposed on States Parties to the Covenant [ICCPR], ¶ 15, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (Mar. 29, 2004) (emphasis added).

In addition, regional human rights agreements recognize the right to a remedy. These treaties reinforce the status of the right to a remedy as a principle of customary international law.

For example, the American Convention provides that "[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention . . . ." American Convention on Human Rights art. 25(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. In *Velásquez Rodríguez v. Honduras* Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 10 (July 21, 1989), the Inter-American Court of Human Rights issued a seminal decision on the right to a remedy. According to the Inter-American Court, "every violation of an international obligation which results in harm creates a duty to make adequate reparation." *Id.*; *see also Garrido & Baigorria*, Inter-Am. Ct. H.R. (ser. C) No. 39, ¶¶ 39-45 (Aug. 27, 1998); *accord Durand & Ugarte*, Inter-Am. Ct. H.R. (ser. C) No. 89, ¶ 24 (Dec. 3, 2001) ("[A]ny violation of an international obligation carries with it the obligation to make adequate reparation.").

The European human rights system also recognizes the right to a remedy. European Convention for the Protection of Human Rights and

Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 221 ("Everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."). The right to a remedy is also implicated by Article 6 of the European Convention, which addresses the right of access to the courts. In *Waite & Kennedy v. Germany*, App. No. 26083/94, 30 Eur. H.R. Rep. 261 (1999), the European Court of Human Rights assessed an international organization's claim of immunity by reference to Article 6. According to the European Court, a material factor in determining whether immunity "is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention." *Id.* ¶ 68.

International organizations are bound by these principles. The Draft Articles on the Responsibility of International Organizations were adopted by the International Law Commission in 2011 and offer a detailed analysis regarding the rights and obligations of international organizations. [13]

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[13] The International Law Commission was established by the U.N. General Assembly to assist in the codification of international law. Its work has led to the adoption of numerous treaties. The Draft Articles on the Responsibility of International Organizations are patterned after the well-regarded Draft Articles on Responsibility of States for Internationally Wrongful Acts. *See generally* James

International Law Commission, Draft Articles on the Responsibility of International Organizations, with Commentaries (2011) ("ILC Draft Articles"). At the outset, the Draft Articles provide that "[e]very internationally wrongful act of an international organization entails the international responsibility of that organization." *Id.* art. 3. Once liability has been established, "[t]he responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act." *Id.* art. 31(1). Such injuries include "any damage, whether material or moral, caused by the internationally wrongful act of an international organization." *Id.* art. 31(2). Reparations "shall take the form of restitution, compensation and satisfaction, either singly or in combination . . . ." *Id.* art. 34.

In sum, "[t]he fact that the right to an effective remedy is recognized as a principle of customary international law means that it is a legally binding obligation on all subjects of international law," including the IFC. Daniel D. Bradlow, *Using a Shield as a Sword: Are International Organizations Abusing Their Immunity?*, 31 Temple Int'l & Comp. L. J. 45, 61 (2017). Accordingly, international organizations "should only have immunity from suit if they can demonstrate that they are offering an internationally legally compliant effective remedy to all their stakeholders." *Id.* at 68. If they

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Crawford, The International Law Commission's Articles on State Responsibility (2002).

cannot do so, "they should lose their immunity and the relevant court should hear the case against them." *Id.*

CONCLUSION

For these reasons, this Court should grant the petition for certiorari and reverse the D.C. Circuit's decision.

Respectfully submitted, February 21, 2018

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No. 17-1011

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, ET AL.,
Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the International Organizations Immunities Act—which affords international organizations the "same immunity" from suit that foreign governments have, 22 U.S.C. § 288a(b)—confers the same immunity on such organizations as foreign governments have under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11.

PARTIES TO THE PROCEEDING

Petitioners, plaintiffs below, are Budha Ismail Jam, Kashubhai Abhrambhai Manjalia, Sidik Kasam Jam, Ranubha Jadeja, Navinal Panchayat, and Machimar Adhikar Sangharash Sangathan.

Respondent, defendant below, is the International Finance Corporation.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

A. Legal Background 2

1. *International Organizations Immunities Act* 2

2. *Immunity Of Foreign States* 6

3. *Executive Branch Construction Of The IOIA* 8

B. Factual Background 10

C. Procedural History 11

SUMMARY OF ARGUMENT 14

ARGUMENT 16

I. THE IOIA'S "SAME IMMUNITY" PROVISION TRACKS THE CURRENT LAW OF FOREIGN SOVEREIGN IMMUNITY, WHICH IS GOVERNED BY THE FSIA 17

A. The Text Of The "Same Immunity" Provision Requires Tracking The Current Law Of Sovereign Immunity 17

B. The Statute's Structure Reinforces That It Incorporates The FSIA 26

TABLE OF CONTENTS
(continued)

Page

C. The IOIA's Purpose And Drafting History Confirm That The "Same Immunity" Provision Incorporates The Current Law Of Foreign Sovereign Immunity 31

II. EVEN IF THE IOIA LOCKED IN THE LAW OF FOREIGN SOVEREIGN IMMUNITY AS OF 1945, THAT LAW WOULD REQUIRE TRACKING THE FSIA 37

A. The Immunity Rule For Foreign Governments In 1945 Was Not Absolute Immunity But Deference To The Political Branches 37

B. Deference To The Political Branches Would Require Application Of The FSIA 40

CONCLUSION 43

TABLE OF AUTHORITIES

Page(s)

Cases

Agency Holding Corp. v. Malley-Duff & Assocs., Inc.,
483 U.S. 143 (1987) 20

Alfred Dunhill of London, Inc. v. Republic of Cuba,
425 U.S. 682 (1976) 7, 40

In re Argyle-Lake Shore Bldg. Corp.,
78 F.2d 491 (7th Cir. 1935) 18

Atkinson v. Inter-Am. Dev. Bank,
156 F.3d 1335 (D.C. Cir. 1998) ..... *passim*

Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC,
813 F.3d 98 (2d Cir. 2016) 33

Batra v. State Bank of India,
2016 WL 3029957 (S.D.N.Y. May 25, 2016) 33

Bell v. New Jersey,
461 U.S. 773 (1983) 36

Berizzi Bros. Co. v. The Pesaro,
271 U.S. 562 (1926) 38, 39

Boise City v. Baxter,
238 P. 1029 (Idaho 1925) 18

Broadbent v. Org. of Am. States,
628 F.2d 27 (D.C. Cir. 1980) 4, 8, 33

TABLE OF AUTHORITIES
(continued)

Page(s)

Brzak v. United Nations,
597 F.3d 107 (2d Cir. 2010) 3

Burnham v. United States,
400 F. App'x 190 (9th Cir. 2010) 20

Carcieri v. Salazar,
555 U.S. 379 (2009) 25

Carr v. United States,
560 U.S. 438 (2010) 23, 24

Chickasaw Nation v. United States,
534 U.S. 84 (2001) 36

Compania Espanola de Navegacion Maritima, S.A. v. The Navemar,
303 U.S. 68 (1938) 41

Corkery v. Hinkle,
217 P. 47 (Wash. 1923) 18, 21

Culver v. People,
43 N.E. 812 (Ill. 1896) 18

Devlin v. United States,
352 F.3d 525 (2d Cir. 2003) 20

Dole Food Co. v. Patrickson,
538 U.S. 468 (2003) 23

El Encanto, Inc. v. Hatch Chile Co.,
825 F.3d 1161 (10th Cir. 2016) 18, 19

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) 20

TABLE OF AUTHORITIES
(continued)

Page(s)

Gaston v. Lamkin,
21 S.W. 1100 (Mo. 1893) 18

George Williams Coll. v. Vill. of Williams Bay,
7 N.W.2d 891 (Wis. 1943) 18

In re Guenthoer's Estate,
83 A. 617 (Pa. 1912) 18

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,
484 U.S. 49 (1987) 23, 26

Hardt v. Reliance Standard Life Ins. Co.,
560 U.S. 242 (2010) 17

Hassett v. Welch,
303 U.S. 303 (1938) 18

In re Heath,
144 U.S. 92 (1892) 18

Jones v. Alfred H. Mayer Co.,
392 U.S. 409 (1968) 22

Jones v. Dexter,
8 Fla. 276 (1859) 18

People ex rel. Kell v. Kramer,
160 N.E. 60 (Ill. 1928) 18

Kendall v. United States ex rel. Stokes,
37 U.S. (1 Pet.) 524 (1838) 18

TABLE OF AUTHORITIES
(continued)

Page(s)

Kugler's Appeal,
55 Pa. 123 (1867) 18, 22

Lamont v. Travelers Ins. Co.,
24 N.E.2d 81 (N.Y. 1939) 41

Mohamad v. Palestinian Auth.,
566 U.S. 449 (2012) 31

Nyambal v. Int'l Monetary Fund,
772 F.3d 277 (D.C. Cir. 2014) 3

OSS Nokalva, Inc. v. Eur. Space Agency,
617 F.3d 756 (3d Cir. 2010) ..... *passim*

Osseiran v. Int'l Fin. Corp.,
552 F.3d 836 (D.C. Cir. 2009) 13

Panama R. Co. v. Johnson,
264 U.S. 375 (1924) 17

Republic of Austria v. Altmann,
541 U.S. 677 (2004) ..... *passim*

Republic of Iraq v. Beaty,
556 U.S. 848 (2009) 39

Republic of Mexico v. Hoffman,
324 U.S. 30 (1945) 6, 39, 40, 41

Ex parte Republic of Peru,
318 U.S. 578 (1943) 6, 38, 39, 40

Rubin v. Islamic Republic of Iran,
138 S. Ct. 816 (2018) 27

TABLE OF AUTHORITIES
(continued)

Page(s)

Runyon v. McCrary,
427 U.S. 160 (1976).....22

Russello v. United States,
464 U.S. 16 (1983).....27

Samantar v. Yousuf,
560 U.S. 305 (2010).....*passim*

The Schooner Exch. v. McFaddon,
11 U.S. (7 Cranch) 116 (1812).....38

Stafford v. Briggs,
444 U.S. 527 (1980).....23

Star Athletica, L.L.C. v. Varsity Brands, Inc.,
137 S. Ct. 1002 (2017).....26

State v. Beckner,
198 N.W. 643 (Iowa 1924).....18

Trammel v. United States,
445 U.S. 40 (1980).....36, 37

Ulen & Co. v. Bank Gospodarstwa Krajowego (Nat'l Economic Bank),
24 N.Y.S.2d 201 (App. Div. 1940).....41

Underhill v. Hernandez,
168 U.S. 250 (1897).....38

United States v. Deutsches Kalisyndikat Gesellschaft,
31 F.2d 199 (S.D.N.Y. 1929).....41

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Kozminski,
487 U.S. 931 (1988) 19

United States v. Manahan Chem. Co.,
23 C.C.P.A. 332 (1936) 18, 21

Verlinden B.V. v. Cent. Bank of Nigeria,
461 U.S. 480 (1983) ..... *passim*

Winchell v. U.S. Dep't of Agric.,
961 F.2d 1442 (9th Cir. 1992) 20

Statutes

1 U.S.C. § 1 24

22 U.S.C. § 288 ..... *passim*

22 U.S.C. § 288a ..... *passim*

22 U.S.C. § 288c 27

22 U.S.C. § 288d 27, 28, 29

22 U.S.C. § 288f 28, 29

28 U.S.C. § 1254 1

28 U.S.C. § 1602 7

28 U.S.C. § 1603 ..... 23, 34

28 U.S.C. § 1604 7

28 U.S.C. § 1605 ..... 7, 8, 12

28 U.S.C. § 1606 8

28 U.S.C. § 1607 7

28 U.S.C. § 1652 20

TABLE OF AUTHORITIES
(continued)

Page(s)

28 U.S.C. § 2674 20

30 U.S.C. § 242 25

42 U.S.C. § 1981 22

42 U.S.C. § 1982 22

N.C. Gen. Stat. § 4-1 25

Rules

Fed. R. Evid. 501 37

Executive Materials

Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962) 3, 30

Exec. Order No. 11,718, 38 Fed. Reg. 12,797 (May 14, 1973) 30

Exec. Order No. 12,359, 47 Fed. Reg. 17,791 (Apr. 22, 1982) 30

Exec. Order No. 12,425, 48 Fed. Reg. 28,069 (June 16, 1983) 30

Exec. Order No. 12,508, 50 Fed. Reg. 11,837 (Mar. 22, 1985) 3

Exec. Order No. 12,567, 51 Fed. Reg. 35,495 (Oct. 2, 1986) 3

Other Authorities

2B Sutherland Statutory Construction (7th ed., West 2012) 17

91 Cong. Rec. 12,432 (Dec. 20, 1945) 32

TABLE OF AUTHORITIES
(continued)

Page(s)

91 Cong. Rec. 12,530 (Dec. 21, 1945).....34

John W. Brabner-Smith, *Incorporation by Reference and Delegation of Power—Validity of "Reference" Legislation*, 5 Geo. Wash. L. Rev. 198 (1937).....18

G.A. Endlich, A Commentary on the Interpretation of Statutes (1888).....21

Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 Vand. L. Rev. 791 (1951).....25

H.R. 4489 (as introduced, Oct. 24, 1945).....5, 16, 36

H.R. 4489 (as reported by S. Comm. on Fin., Dec. 18, 1945).....36

H.R. Rep. No. 79-1203 (1945).....4, 5, 32

H.R. Rep. No. 105-802 (1998).....36

Samuel P. Huntington, *Transnational Organizations in World Politics*, 25 World Pol. 333 (1973).....3

Int'l Fin. Corp., *Annual Report 2017* (2017).....10

Int'l Fin. Corp., *Policy on Environmental and Social Sustainability* (2012).....10

TABLE OF AUTHORITIES
(continued)

Page(s)

Letter from Arnold Kanter, Acting Sec'y of State, to President George H.W. Bush (Sept. 12, 1992), *in* 1 Digest of United States Practice in International Law, 1991-1999 (Sally J. Cummins & David P. Stewart eds., 2005) 9

Letter from Robert B. Owens, Legal Adviser, U.S. Dep't of State, to Leroy D. Clark, Gen. Counsel, Equal Emp't Opportunity Comm'n (June 24, 1980), *reprinted in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917 (1980) 9

Lawrence Preuss, *The International Organizations Immunities Act*, 40 Am. J. Int'l L. 332 (1946) 4

Horace Emerson Read, *Is Referential Legislation Worth While?*, 25 Minn. L. Rev. 261 (1941) 18

Restatement (Third) of Foreign Relations Law (1987) 32

S. Rep. No. 79-861 (1945) 4, 5, 32, 34, 35

TABLE OF AUTHORITIES
(continued)

Page(s)

Letter from Harold D. Smith, Dir. of the Bureau of the Budget, to James F. Byrnes, U.S. Sec'y of State (Nov. 6, 1945), *reprinted in* H.R. Rep. No. 79-1203 (1945) 4

Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) 7

The Oxford Handbook of International Organizations (Jacob Katz Cogan, et al. eds., 2016) 2, 32

G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1 (1999) 23, 38

Aaron I. Young, *Deconstructing International Organization Immunity*, 44 Geo. J. Int'l L. 311 (2012) 34

BRIEF FOR PETITIONERS

Petitioners Budha Ismail Jam, et al., respectfully request that this Court reverse the judgment of the U.S. Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 860 F.3d 703 (D.C. Cir. 2017) and reprinted at Pet. App. 1a-22a. The district court's opinion granting respondent's motion to dismiss is reported at 172 F. Supp. 3d 104 (D.D.C. 2016) and reprinted at Pet. App. 23a-38a.

JURISDICTION

The court of appeals issued its decision on June 23, 2017. Pet. App. 1a. The court denied rehearing on September 26, 2017. *Id.* 39a. On December 11, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 25, 2018. The petition for a writ of certiorari was filed on January 19, 2018 and granted on May 21, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The provision of the International Organizations Immunities Act (IOIA) directly at issue here provides that designated international organizations "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b).

The entirety of the IOIA is reproduced in the appendix to this brief.

STATEMENT OF THE CASE

Petitioners sued an international organization, the International Finance Corporation, alleging injuries caused by its commercial activity. The International Organizations Immunities Act (IOIA) provides that such organizations are entitled only to "the same immunity" from suit that "is enjoyed by foreign governments." 22 U.S.C. § 288a(b). And for more than sixty-five years (initially as a matter of executive policy, and since 1976 under the Foreign Sovereign Immunities Act (FSIA)), foreign states have *not* enjoyed immunity for their commercial acts. Yet the D.C. Circuit held that the IOIA requires dismissal of this lawsuit. According to the court of appeals, international organizations are entitled to "'virtually absolute immunity'"—a different and significantly greater form of immunity than foreign governments currently enjoy. Pet. App. 4a (quoting *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1340 (D.C. Cir. 1998)).

The question presented is whether the D.C. Circuit's construction of the IOIA's "same immunity" provision is correct.

A. Legal Background

1. *International Organizations Immunities Act*

a. Over the past several decades, the public and commercial landscape has become populated with dozens of "international organizations"—that is, public organizations in which multiple countries are members pursuant to treaties or similar foundational laws. *The Oxford Handbook of International Organizations*, at v-vi (Jacob Katz Cogan, et al. eds.,

2016); Samuel P. Huntington, *Transnational Organizations in World Politics*, 25 World Pol. 333, 333 (1973). These organizations pursue a range of ends—from providing health care to managing fisheries to financing private economic development. Examples to which the United States belongs include the World Tourism Organization, *see* Exec. Order No. 12,508, 50 Fed. Reg. 11,837 (Mar. 22, 1985); the Great Lakes Fishery Commission, *see* Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962); and the Inter-American Investment Corporation, *see* Exec. Order No. 12,567, 51 Fed. Reg. 35,495 (Oct. 2, 1986); *see also* 22 U.S.C. § 288 app. (listing all designated organizations). Many international organizations are headquartered in the United States, and some—such as the North American Development Bank and the Border Environmental Cooperation Commission—develop and finance projects on U.S. soil.

The founding agreements of some international organizations provide organization-specific privileges and immunities. The charters of the United Nations and the International Monetary Fund, for example, give them absolute immunity from suit. *See, e.g.*, *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 281 (D.C. Cir. 2014); *Brzak v. United Nations*, 597 F.3d 107, 110-12 (2d Cir. 2010). Other organizations' charters do not address such immunity. To the extent an organization's founding agreement is silent respecting immunity from suit—or any other privilege or immunity—the IOIA establishes an array of default rules.

b. The IOIA was enacted in 1945. At the time, U.S. law recognized the legal personhood of international organizations, but it provided no jurisdictional immunity for them or their personnel. S. Rep. No. 79-861, at 2 (1945); H.R. Rep. No. 79-1203, at 2 (1945); Lawrence Preuss, *The International Organizations Immunities Act*, 40 Am. J. Int'l L. 332, 333 (1946). Indeed, the United States asserted that organizational immunity from suit had no basis in international or U.S. law. *See* Preuss, 40 Am. J. Int'l L. at 333. Consequently, international organizations were vulnerable to suit in circumstances where their constituent foreign governments would otherwise be accorded immunity. S. Rep. No. 79-861, at 2; H.R. Rep. No. 79-1203, at 2; Preuss, 40 Am. J. Int'l L. at 333-34.

The State Department and Congress determined that this disparity was inconsistent with the United States' interest in treating international organizations like public entities. S. Rep. No. 79-861, at 2; H.R. Rep. No. 79-1203, at 2. Accordingly, the State Department proposed and Congress adopted the IOIA. *See* Br. for the United States as Amicus Curiae at 5, *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465) [hereinafter "U.S. *Broadbent* Brief"].[1] The "basic purpose" of the legislation was "to confer upon international organizations, and officers and employees thereof, privileges

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[1] *See also* Letter from Harold D. Smith, Dir. of the Bureau of the Budget, to James F. Byrnes, U.S. Sec'y of State (Nov. 6, 1945), *reprinted in* H.R. Rep. No. 79-1203, at 7 (describing State Department's role in drafting and advocating for IOIA).

and immunities of a governmental nature." S. Rep. No. 79-861, at 1; *accord* H.R. Rep. No. 79-1203, at 1.

c. The IOIA applies to any "public international organization in which the United States participates . . . and which [has] been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in" the statute. 22 U.S.C. § 288.

With respect to protection from lawsuits, Congress initially considered granting international organizations unqualified immunity. The House Bill would have granted international organizations "immunity from suit and every form of judicial process." H.R. 4489, 79th Cong. § 2(b) (as introduced, Oct. 24, 1945). But the Senate set aside this language, and Congress instead adopted a default rule that ties international organization immunity directly to foreign sovereigns' immunity. *See* Pet. App. 14a-15a (Pillard, J., concurring). The operative provision—22 U.S.C. § 288a(b)—provides that, absent waiver of immunity, such organizations shall enjoy "the same immunity" from suit that "is enjoyed by foreign governments."

The IOIA also contains a provision allowing the President to limit any of the IOIA's privileges, exemptions, and immunities on an organization-by-organization basis. That provision authorizes the President to "withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in [the IOIA] or to condition or limit the enjoyment by any such organization or its officers or employees

of any such privilege, exemption, or immunity." 22 U.S.C. § 288.

2. *Immunity Of Foreign States*

"The doctrine of foreign sovereign immunity developed as a matter of common law." *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). When the IOIA was enacted in 1945, that common law doctrine had recently transitioned from a substantive regime into a rule of deference. That is, courts at that time "'deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction' over particular actions against foreign sovereigns." *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)).

Under this system, when the State Department requested (or a clear executive policy dictated) immunity, courts would grant it. *Samantar*, 560 U.S. at 311-12 (citing *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943)). But sometimes no political actor had expressed a case-specific preference or pronounced a rule for courts to apply. In those circumstances, courts themselves made case-by-case determinations according to their best perceptions of political branch policy. *See, e.g.*, *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36-38 (1945) (denying immunity where foreign sovereign owned, but was not in possession of, a vessel being used for commercial purposes).

Shortly after the IOIA was enacted, the political branches adopted a broad substantive policy provid-

ing considerably more guidance. In a 1952 letter written by State Department Acting Legal Adviser Jack B. Tate (the "Tate Letter"), the United States announced that the Executive Branch endorsed what is widely known as the "restrictive theory" of sovereign immunity. Under this conception, foreign sovereigns are immune from suit based on public acts, but not based on commercial activities. *See Verlinden*, 461 U.S. at 487 (citing Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976) (App. 2 to opinion of the Court)). The Executive Branch retained the authority to file suggestions of immunity even "'where immunity would not have been available under the restrictive theory.'" *Altmann*, 541 U.S. at 690 (quoting *Verlinden*, 461 U.S. at 487-88). But absent such a suggestion, courts applied the rules articulated in the Tate Letter. *Id.*

In 1976, Congress enacted the FSIA. The Act "'codifie[d], as a matter of federal law, the restrictive theory of sovereign immunity'" and "transfer[red] primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Altmann*, 541 U.S. at 691 (quoting *Verlinden*, 461 U.S. at 488); *see* 28 U.S.C. § 1602. The FSIA provides that a "foreign state is normally immune from the jurisdiction of federal and state courts, 28 U.S.C. § 1604, subject to a set of exceptions specified in [Sections] 1605 and 1607." *Verlinden*, 461 U.S. at 488. Those exceptions include actions based upon "commercial activity" of the foreign sovereign "car-

ried on in the United States" or "caus[ing] a direct effect in the United States." 28 U.S.C. § 1605(a)(2). "When one of these or the other specified exceptions applies, 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.'" *Verlinden*, 461 U.S. at 488-89 (quoting 28 U.S.C. § 1606).

3. *Executive Branch Construction Of The IOIA*

The Executive Branch's longstanding, "considered view" is that the scope of international organization immunity from suit "under the IOIA [is] not frozen as of 1945, but follows developments in the law of foreign sovereign immunity." Pet. App. 15a (Pillard, J., concurring).

Before the FSIA, when the Tate Letter controlled, the State Department retained the ability to make suggestions of immunity for international organizations. *See* D. Ct. Dkt. 22-7, Herz Decl., Ex. 11, Letter from Detlev F. Vagts, Off. of the Legal Adviser, U.S. Dep't of State, to Robert M. Carswell, Jr., Org. of Am. States, at 1-2 (Mar. 24, 1977). But the year after the FSIA was enacted, the State Department concluded that such suggestions were no longer appropriate because the IOIA "links" its immunity rules to the FSIA. *Id.* Shortly thereafter, the Government explained to the D.C. Circuit that the "express language and the statutory purposes underlying the [IOIA] bring international organizations within the terms of the [FSIA]." U.S. *Broadbent* Brief, *supra*, at 8-9 (quotation omitted); *see also Broadbent*, 628 F.2d at 31 (acknowledging this view). Any argument to the contrary, the Government

maintained, was "devoid of substance." U.S. *Broadbent* Brief, *supra*, at 8-9.

The Government has reiterated this position numerous times, across multiple administrations. In 1980, the State Department Legal Adviser explained: "By virtue of the FSIA, . . . international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities . . . ." Letter from Robert B. Owens, Legal Adviser, U.S. Dep't of State, to Leroy D. Clark, Gen. Counsel, Equal Emp't Opportunity Comm'n (June 24, 1980), *reprinted in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917, 918 (1980). In 1992, the Department stated that the United States typically "afford[s]" only "restrictive immunity" to international organizations. Letter from Arnold Kanter, Acting Sec'y of State, to President George H.W. Bush (Sept. 12, 1992), *in* 1 Digest of United States Practice in International Law, 1991-1999, at 1016 (Sally J. Cummins & David P. Stewart eds., 2005), http://bit.ly/2EKesoE. And in 1997, the United States twice filed appellate briefs maintaining that international organizations' immunity from suit tracks that of foreign states under the FSIA.[2]

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[2] *See* Br. for the United States as Amicus Curiae at *5 n.3, *Taiwan v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 1997 WL 33555046 (9th Cir. May 28, 1997) (No. 97-70375) ("The [IOIA] provides that international organizations have the same immunity from suit as foreign governments, and the immunity of foreign governments is, in turn, defined by the FSIA." (citation omitted)); Br. for the United States as Amicus Curiae at *14, *Corrinet v. United Nations*, 1997 WL 33702375 (9th Cir. Mar.

B. Factual Background

This case arises out of a commercial development project financed by respondent, the International Finance Corporation (IFC or "the Corporation"). The IFC was established and designated as an international organization in 1956. It is headquartered in the District of Columbia, where its directors sit and nearly half of its more than 3,800 employees work. IFC, *Annual Report 2017*, at 84, 86 (2017). Its purpose is "to further economic development" and "fight poverty" around the world. Pet. App. 3a, 24a; IFC, *Policy on Environmental and Social Sustainability* 2 (2012), http://bit.ly/2mJbbiR. To carry out this mission, the Corporation provides loans to private businesses for projects in developing countries that otherwise could not attract private capital. Pet. App. 3a, 24a.

In 2008, the IFC's directors approved a loan of $450 million to Coastal Gujarat Power Limited (CGPL), to help finance the construction of the Tata Mundra Ultra Mega, a coal-fired power plant in Gujarat, India. Pet. App. 3a, 23a-25a. The project entailed significant social and environmental risks. Consequently, the IFC retained "supervisory authority" over the venture, and the loan agreement expressly conditioned ongoing disbursements on CGPL's compliance with various conditions. *Id.* 3a.

12, 1997) (No. 96-17130) ("Since Section 2 of the [IOIA] grants international organizations the same immunities as 'foreign governments,' the FSIA in effect defines the immunities that international organizations as institutions enjoy under the IOIA." (citations omitted)).

In particular, the loan agreement included an Environmental and Social Action Plan designed to ensure that the plant complied with the IFC's performance standards and to mitigate potential harms. Pet. App. 3a, 24a-25a. The loan agreement required quarterly reporting on compliance issues, including any remedial steps, "in form and substance satisfactory to the" IFC. D. Ct. Dkt. 10-6, Suratgar Decl., Ex. 1, Part 2, at 41. The IFC also retained authority to actively manage the project and to require corrective action, including changing CGPL's board of directors and senior management. *Id.* at 18-19, 21. Finally, the agreement gave IFC the power to "revoke financial support for the project" should CGPL fail to live up to its obligations. Pet. App. 3a.

The IFC, however, "inadequate[ly] supervis[ed] . . . the project," and "the plant's construction and operation did not comply with the Plan." Pet. App. 3a. As a result, the very risks that the Corporation anticipated occurred. The plant has had—and continues to have—a "devastat[ing]" environmental and social impact on the community in which it was built. *Id.* 2a & n.1. Yet the IFC has taken no meaningful steps to address the situation. *See id.* 3a.

C. Procedural History

1. Petitioners are farmers and fishermen who have been harmed by the power plant, a local fisherman's association, and a nearby village. Pet. App. 2a, 25a-26a. In 2015, they sued the IFC in the U.S. District Court for the District of Columbia, alleging various common law claims, including negligent supervision and breach of contract. *Id.* 28a.

The IFC moved to dismiss the complaint, arguing (as relevant here) that the IOIA bars the suit. Pet. App. 28a. Petitioners responded that the IOIA's "same immunity" provision grants international organizations the same immunity—and nothing more—than the FSIA grants foreign states. And under the FSIA, foreign states are amenable to suit for "commercial activities" performed in or relating to the United States, such as the financing actions and supervisory duties at issue. *See id.* 3a-5a; 28 U.S.C. § 1605(a)(2).

The district court granted the IFC's motion. The court observed that in *Atkinson v. Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998), the D.C. Circuit had held that (i) the IOIA incorporates the law of foreign sovereign immunity only as it existed in 1945, and (ii) at that time, foreign sovereigns were entitled to "absolute" immunity. Pet. App. 33a, 37a-38a (citing *Atkinson*, 156 F.3d at 1340). The district court acknowledged that the Third Circuit has rejected *Atkinson*, concluding that the IOIA "incorporate[s] subsequent changes in the law of foreign sovereign immunity (like the Foreign Sovereign Immunity Act's commercial activity exception)." *Id.* 37a (citing *OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756 (3d Cir. 2010)). But the district court was without authority to deviate from controlling precedent in its own circuit. *Id.* 38a.

The district court also concluded that the IFC had not waived its immunity. Although the IFC's founding charter contains "broad language" providing that the organization may be sued, D.C. Circuit precedent construes such waivers to be operative on-

ly insofar as a court believes the particular type of lawsuit "'would benefit the organization over the long term.'" Pet. App. 31a-32a (quoting *Osseiran v. Int'l Fin. Corp.*, 552 F.3d 836, 840 (D.C. Cir. 2009)). The district court found that test unsatisfied here. *Id.* 36a-38a.

2. The D.C. Circuit affirmed, declaring that its *Atkinson* decision stood "as an impassable barrier" to petitioners' suit. Pet. App. 7a. The panel majority acknowledged that, in the years leading up to 1945, courts merely ""deferred to the decisions of the political branches"" on questions of foreign sovereign immunity, rather than automatically affording absolute immunity. *Id.* 6a (quoting *Altmann*, 541 U.S. at 689 (quoting in turn *Verlinden*, 461 U.S. at 486)). But the panel stressed that "the *holding* of *Atkinson*—regardless how one characterizes the immunity of foreign sovereigns in 1945—was that international organizations [a]re given complete immunity by the IOIA." *Id.*

The D.C. Circuit also concluded that the IFC had not waived its immunity. The panel majority conceded that petitioners' claims would "in some sense . . . 'benefit'" the IFC because allowing the claims to go forward would assure communities considering future projects that the Corporation can be held accountable for causing harms. Pet. App. 8a, 10a-11a. But, being "obliged to apply" its waiver test to preclude at least some claims that the FSIA's commercial activity exception would allow, the court of appeals held that the IFC's waiver did not encompass petitioners' claims. *Id.* 8a, 11a.

Judge Pillard wrote separately to say that were the panel "not bound by *Atkinson*, [she] would hold"—like the Third Circuit—"that international organizations' immunity under the IOIA is the same as the immunity enjoyed by foreign states." Pet. App. 16a. Judge Pillard explained that, "[w]hen a statute incorporates existing law by reference," as the IOIA does, "the incorporation is generally treated as dynamic, not static: As the incorporated law develops, its role in the referring statute keeps up." *Id.* 12a. And that canon, Judge Pillard concluded, "makes sense" here. *Id.* 16a. "Neither the IOIA nor [the D.C. Circuit's] cases interpreting it explain why nations that collectively breach contracts or otherwise act unlawfully through organizations should enjoy immunity in our courts when the same conduct would not be immunized if directly committed by a nation acting on its own." *Id.*

Judge Pillard also registered her disapproval of the D.C. Circuit's waiver jurisprudence. Rather than establishing an absolute immunity rule and then creating case-by-case exceptions according to an "amorphous" waiver-curbing doctrine, she maintained it would be far better to consider assertions of immunity using the "time-tested body of law under the FSIA." Pet. App. 21a.

SUMMARY OF ARGUMENT

The D.C. Circuit is incorrect that the IOIA gives international organizations absolute immunity from suit. Rather, by its plain terms, the IOIA tracks the rules established in the FSIA.

I. The IOIA gives international organizations "the same immunity" from suit "as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). Under the time-honored reference canon, a statutory directive to apply another general body of law dictates that the statute incorporates that body of law as it exists at the time of suit. And the current law of foreign sovereign immunity is governed by the FSIA. The IOIA's use of the present tense—"as *is* enjoyed"—reinforces that analysis, for a statute expressed in that tense must be applied as of the time of suit.

The IOIA's structure, purpose, and drafting history confirm what the plain text of the "same immunity" provision requires. Various subsections of the Act give international organizations and their officers complete immunity from certain actions. Other subsections expressly distinguish international organizations' privileges or exemptions from those of foreign states. But the provision dealing with organizational immunity *from suit* does neither. Congress's decision to take a different tack in that context demonstrates its desire to eschew either absolute protection or differential treatment. And that legislative determination makes perfect sense. International organizations are compilations of sovereigns, so the rules governing the latter's amenability to suit ought to govern the former's. Put another way, foreign states should not be able to evade legal accountability for private endeavors, such as commercial activities, simply by pursuing them through international organizations.

Lest there be any doubt, the Congress that enacted the IOIA specifically considered and rejected pro-

posed language that would have given international organizations complete immunity from suit. The House version of the Act would have afforded international organizations "immunity from suit and every form of judicial process." H.R. 4489, 79th Cong. § 2(b) (as introduced, Oct. 24, 1945). Yet the Senate rejected that proposal in favor of the "same immunity" language ultimately enacted. The D.C. Circuit erred in reading into the IOIA the very rule Congress set aside.

II. Even if the court of appeals were correct that the IOIA locks in the approach to foreign sovereign immunity that prevailed in 1945, when the IOIA was enacted, that interpretation would still lead right back to the FSIA. As this Court has repeatedly recognized, the rule in 1945 was that courts deferred to the political branches' current views regarding whether foreign states were entitled to immunity. And for decades, the political branches have consistently endorsed the restrictive theory of sovereign immunity that the FSIA codifies. Accordingly, the law of 1945—if it applied here—would require this Court to apply the FSIA.

ARGUMENT

The IOIA's "same immunity" provision does not place international organizations uniquely beyond the reach of the law. Instead, it incorporates the current law of foreign sovereign immunity, which is governed by the FSIA.

I. THE IOIA'S "SAME IMMUNITY" PROVISION TRACKS THE CURRENT LAW OF FOREIGN SOVEREIGN IMMUNITY, WHICH IS GOVERNED BY THE FSIA

A. The Text Of The "Same Immunity" Provision Requires Tracking The Current Law Of Sovereign Immunity

The Court "must enforce plain and unambiguous statutory language according to its terms." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010). The IOIA affords international organizations only the "same immunity . . . as is enjoyed by" foreign governments. 22 U.S.C. § 288a(b). That text incorporates the law of foreign sovereign immunity as currently codified in the FSIA.

1. Congress frequently drafts statutes that refer to another body of law. And under the "reference canon," statutes that "refer[] to the law on a subject generally" are "construed to [incorporate] the law . . . as it reads thereafter at any given time including amendments subsequent to the time of adoption." 2B Sutherland Statutory Construction § 51:7 (7th ed., West 2012) (quotation omitted). Only when a statute "refers specifically to a particular statute" does it exclude subsequent amendments. *Id.*

The reference canon was established long before the IOIA was enacted. In 1924, for instance, this Court explained that "adopt[ion] by a generic reference" was a "recognized mode" of statutorily latching one body of law to another, thereby allowing the statute to incorporate "new rules" in the referenced body of law as they come into being. *Panama R. Co.*

v. Johnson, 264 U.S. 375, 391-92 (1924); *see also Hassett v. Welch*, 303 U.S. 303, 314 (1938) (recognizing the canon); *In re Heath*, 144 U.S. 92, 93-94 (1892) (same); *Kendall v. United States ex rel. Stokes*, 37 U.S. (1 Pet.) 524, 622-25 (1838) (same). By 1945, a multitude of lower federal courts, state courts, and commentators had recognized the reference canon as well.[3]

The canon also makes eminent sense. As Justice Gorsuch explained shortly before joining this Court, when a statute refers to a general body of law, its ordinary meaning directs people to that law as it exists "on any given day, today included." *El Encanto, Inc. v. Hatch Chile Co.*, 825 F.3d 1161, 1164 (10th Cir. 2016). Indeed, as years and decades pass from the statute's original enactment, it would become increasingly irrational to require lawyers and judges—not to mention lay persons—"to become experts in

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[3] For lower federal courts, *see, e.g.*, *In re Argyle-Lake Shore Bldg. Corp.*, 78 F.2d 491, 494 (7th Cir. 1935); *United States v. Manahan Chem. Co.*, 23 C.C.P.A. 332, 333-36 (1936). For state courts, *see, e.g.*, *George Williams Coll. v. Vill. of Williams Bay*, 7 N.W.2d 891, 894-95 (Wis. 1943); *People ex rel. Kell v. Kramer*, 160 N.E. 60, 67-68 (Ill. 1928); *Boise City v. Baxter*, 238 P. 1029, 1033 (Idaho 1925); *State v. Beckner*, 198 N.W. 643, 644 (Iowa 1924); *Corkery v. Hinkle*, 217 P. 47, 49 (Wash. 1923); *In re Guenthoer's Estate*, 83 A. 617, 618-19 (Pa. 1912); *Culver v. People*, 43 N.E. 812, 814-15 (Ill. 1896); *Gaston v. Lamkin*, 21 S.W. 1100, 1103-04 (Mo. 1893); *Kugler's Appeal*, 55 Pa. 123, 124-25 (1867); *Jones v. Dexter*, 8 Fla. 276, 288-89 (1859). For commentators, *see, e.g.*, Horace Emerson Read, *Is Referential Legislation Worth While?*, 25 Minn. L. Rev. 261, 273 (1941); John W. Brabner-Smith, *Incorporation by Reference and Delegation of Power—Validity of "Reference" Legislation*, 5 Geo. Wash. L. Rev. 198, 203 (1937).

the vestigial esoterica" of bygone legal eras. *Id.* By tethering the law governing one matter to the general law governing another, Congress uses an effective shorthand that enables the referential statute to update itself according to evolving developments and necessities.

Section 288a(b) is a textbook general reference statute. It refers to a body of law generally—*viz.*, the law governing "immunity from suit . . . enjoyed by foreign governments," 22 U.S.C. § 288a(b)—not to any identifiable statutory provision. The plain text of the statute thus "incorporate[s] by reference a large body of potentially evolving federal law." *United States v. Kozminski*, 487 U.S. 931, 941 (1988); *see also El Encanto*, 825 F.3d at 1164 (the "plain language" of a statute referencing the Federal Rules of Civil Procedure as a whole required application of the Rules as they existed at the time of suit, not at the time of the statute's enactment).

Two aspects of the IOIA's "same immunity" provision make its dynamic incorporation of foreign sovereign immunity law particularly apparent.

First, when the IOIA was enacted, *there was no specific foreign sovereign immunity statute* to which Congress could have referred. Rather, "[t]he doctrine of foreign sovereign immunity" was "a matter of common law." *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). Common law, of course, is inherently evolving. No legislator referring to a general body of common law could reasonably think he or she is freezing a rule in place for all time.

That is why courts of appeals routinely construe federal statutes referencing state common law as incorporating that law on an evolving basis. For instance, the Federal Tort Claims Act (FTCA) provides that "[t]he United States shall be liable [in tort] . . . in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Courts have made clear that this provision incorporates state tort law as it currently stands. *See, e.g.*, *Burnham v. United States*, 400 F. App'x 190, 191-92 (9th Cir. 2010); *Winchell v. U.S. Dep't of Agric.*, 961 F.2d 1442, 1443-45 (9th Cir. 1992); *see also Devlin v. United States*, 352 F.3d 525, 530-32 (2d Cir. 2003) (FTCA provision making United States liable "in accordance with the law of the place where the act or omission occurred" ties Government's liability to the "evolving tort law of the several states").

Similarly, it would be absurd to construe the Rules of Decision Act, which provides that "[t]he laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply," 28 U.S.C. § 1652, to require federal courts sitting in diversity to adjudicate cases based upon the common law rules extant when that statute was enacted in 1789. To the contrary, "the Act require[s] application of future state laws" too. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 163 (1987) (Scalia, J., concurring in the judgment); *see generally Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

There is no basis to read the IOIA's "same immunity" provision differently. That provision's gen-

eral reference to the law governing "immunity from suit . . . enjoyed by foreign governments" can be read only to incorporate the evolving body of foreign sovereign immunity law, not to freeze in the particulars of that law that existed in 1945. That is all the more true because the common law of foreign sovereign immunity itself was in a period of recalibration at the time, having shifted from a regime in which courts made their own policy assessments to one in which the Executive's views had primacy. *See* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1, 134-45 (1999) (summarizing shift). Congress thus would have been acutely aware both that the common law of sovereign immunity itself was prone to change, and that the then-extant rule of deference would itself produce changing results as the political branches' foreign policy evolved.

Second, the word "same" in the IOIA's "same immunity" provision reinforces that the scope of international organization immunity continually tracks that of foreign sovereign immunity. As numerous authorities recognized before the passage of the IOIA, a statute that treats one thing "the same as" another is "intended 'as a rule for future conduct . . . always to be found, when it is needed[,] by reference to the law . . . existing at the time when the rule is invoked.'" *Corkery*, 217 P. at 49 (third alteration in original) (quoting G.A. Endlich, A Commentary on the Interpretation of Statutes § 483 (1888)).[4] Con-

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[4] *See also Manahan Chem. Co.*, 23 C.C.P.A. at 333-36 (statute giving import appraisal authorities "the same jurisdiction, powers, and duties . . . as in the case of appeals and protests

gress's declaration that two forms of protection are "the same" reflects a determination that they are by nature equivalent, and should move together.

For example, Congress used a nearly identical formulation in the Civil Rights Act of 1866, which Congress enacted to put black and white citizens on equal footing after the Civil War. *Runyon v. McCrary*, 427 U.S. 160, 170 (1976). That statute provides that "[a]ll persons within the jurisdiction of the United States shall have *the same* right . . . to make and enforce contracts, to sue, be parties, give evidence, . . . *as is enjoyed* by white citizens." 42 U.S.C. § 1981(a) (emphasis added); *see also id.* § 1982 ("All citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property."). Congress obviously did not mean to guarantee black citizens nothing more than the rights that whites enjoyed in 1866. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 429 (1968). Rather, the statute mandates continuing legal equality between citizens.

So too here. Congress determined that for purposes of immunity from suit, international organizations and foreign governments should be treated "the same." That is an unambiguous directive that inter-

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relating to customs duties under existing law" referred to law in force when merchandise was imported, not when statute was enacted); *Kugler's Appeal*, 55 Pa. at 124-25 (statute providing that proceeding for alteration of election district boundaries "shall be the same as in the erection or alteration of the lines of townships" referred to township division law existing when rule was invoked).

national organizations and foreign sovereigns should be treated equally for such immunity purposes, today as in 1945.

2. That conclusion is confirmed by the fact that the IOIA is written in the present tense: International organizations are afforded the same immunity "as *is* enjoyed" by foreign governments. 22 U.S.C. § 288a(b) (emphasis added). This Court has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr v. United States*, 560 U.S. 438, 448 (2010). Where, as here, a statute is "expressed in the present tense," its "plain text" requires applying the law "at the time suit is filed." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003).

In *Dole Food*, for instance, the Court construed the FSIA's requirement that an entity seeking to remove a lawsuit to federal court show that "'a majority of [its] shares . . . *is* owned by a foreign state.'" 538 U.S. at 473 (emphasis added) (quoting 28 U.S.C. § 1603(b)(2)). The Court held that "because it is expressed in the present tense," the provision "requires that instrumentality status be determined at the time suit is filed." *Id.* at 478. Similarly, in *Stafford v. Briggs*, 444 U.S. 527 (1980), the Court held that, given its use of the word "is," the expanded venue provided by the Mandamus and Venue Act of 1962 applies only to actions in which the officer was acting in his official capacity or under color of legal authority at the time of suit. *Id.* at 535-36; *see also, e.g.*, *Carr*, 560 U.S. at 449 (adopting a "forward-looking construction of 'travels'"); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S.

49, 59 (1987) (Clean Water Act citizen-suit provision's "pervasive use of the present tense" was a "striking indic[ator]" of its "prospective orientation").

Indeed, the U.S. Code itself codifies the present-tense principle. The Dictionary Act commands that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . words used in the present tense include the future as well as the present." 1 U.S.C. § 1. "By implication, then, the Dictionary Act instructs that the present tense generally does *not* include the past." *Carr*, 560 U.S. at 448 (emphasis added).

Applying the present-tense principle to Section 288a(b)'s phrase "as is enjoyed" makes clear that international organizations have the same immunity that foreign governments enjoy *today*, not the immunity they enjoyed when the IOIA was enacted.

3. Had Congress meant to deviate from the reference and present-tense canons—and thus to dictate that international organizations enjoy the immunity that foreign sovereigns enjoyed in 1945—it had several readily available alternatives to accomplish that result. The fact that it used none of them further demonstrates the court of appeals' error.

Most obviously, Congress could have simply enshrined into law the specific level of immunity it thought existed at the time. Or Congress could have pegged Section 288a(b)'s immunity reference to a particular date or some other linguistic equivalent, as it has done in other statutes. Pet. App. 14a (Pillard, J., concurring); *OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756, 764 (3d Cir. 2010). A

provision of the Energy Policy Act, for instance, provides that "[p]atents issued pursuant to this subsection shall provide for surface use to the same extent as is provided under applicable law prior to October 24, 1992, with respect to oil shale mining claims." 30 U.S.C. § 242(c)(1). Similarly, in *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Court held that a 1934 statute defining "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction" referred only to those under federal jurisdiction when the statute was enacted. *Id.* at 382 (emphasis added). Had Congress wished the statute to incorporate the law "at the time of application," this Court explained, it "could have omitted the word 'now.'" *Id.* at 391.

Alternatively, if Congress wanted the IOIA's "same immunity" provision to freeze the law as of 1945, Congress could have styled the provision as a "reception statute." A tool many states used dating back to the Founding era, reception statutes adopted only those parts of the English common law that were "in force" at the time of the statutes' enactment. *See generally* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 Vand. L. Rev. 791 (1951). A typical reception statute provides that "[a]ll such parts of the common law as *were heretofore in force* and use within this State . . . are hereby declared to be in full force within this State." N.C. Gen. Stat. § 4-1 (emphasis added). The contrast between that language and the IOIA's "same immunity . . . as is enjoyed" wording is evident.

Finally, had Congress wanted to incorporate the foreign sovereign immunity law of 1945, it otherwise "could have phrased [the IOIA] in language that looked to the past." *Gwaltney*, 484 U.S. at 57. The fact that "it did not choose this readily available option," *id.*, confirms its intent to incorporate the *current* law of foreign sovereign immunity, rather than the sovereign immunity law of long ago.

B. The Statute's Structure Reinforces That It Incorporates The FSIA

The D.C. Circuit has acknowledged that the text of the "same immunity" provision implicates the reference canon. *See Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1340-41 (D.C. Cir. 1998). But the court of appeals deemed this "factor" to be "outweighed" by the overall structure of the IOIA, which it has taken to signal that "Congress' intent was to adopt th[e] body of [foreign sovereign immunity] law only as it existed in 1945." *Id.* at 1341. This reasoning is erroneous. "[L]ook[ing] to the provisions of the whole law," *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (quotation omitted), only reinforces that the IOIA's "same immunity" provision incorporates the current law of foreign sovereign immunity.

1. For starters, the general reference to the law of foreign sovereign immunity in Section 288a(b)'s immunity-from-suit provision contrasts sharply with other IOIA provisions governing other privileges and immunities that do *not* refer to another body of law, but instead expressly establish absolute immunity for international organizations.

For example, the subsection that comes right after the immunity-from-suit provision—which lays out various *other* privileges and immunities—provides that international organizations' "[p]roperty and assets . . . shall be immune from search . . . and from confiscation," and that "[t]he archives of international organizations shall be inviolable." 22 U.S.C. § 288a(c). Section 288c similarly provides, without qualification, that international organizations "shall be exempt from all property taxes imposed by, or under the authority of, any Act of Congress." *Id.* § 288c.

This difference between Section 288a(b)'s referential immunity and the absolute immunities found elsewhere in the IOIA shows that Section 288a(b) *does not* establish a complete immunity rule. After all, when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *see also Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) (applying this canon in context of immunity statute); *Samantar*, 560 U.S. at 317 (same). Had Congress intended to grant international organizations static, absolute immunity from suit, it would simply have used language it used elsewhere—e.g., "shall be immune" or "shall be inviolable." It did not.

Indeed, this distinction between static and referential immunity is replicated within another section of the statute—Section 288d—confirming beyond question that Congress's use of one or the other was

deliberate. Section 288d deals with the immunities of international organizations' officers and employees. Subsection (a) of that provision, just like Section 288a(b), links immunity to the body of law covering foreign governments: It provides that "insofar as concerns laws regulating entry into and departure from the United States, alien registration and fingerprinting, and the registration of foreign agents," the officers and employees of international organizations are "entitled to the same privileges, exemptions, and immunities as are accorded under similar circumstances to officers and employees . . . of foreign governments." 22 U.S.C. § 288d(a). But subsection (b) provides that international organizations' officers and employees "shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such . . . officers[] or employees," full stop. *Id.* § 288d(b).

The use of these strikingly different formulations in neighboring subsections means that the Congress that enacted the IOIA saw a clear distinction between the two approaches—for officers and employees, a static rule of immunity; and for organizations themselves, a referential, dynamic rule that changes along with the body of law to which it refers. Congress's choice to use the latter formulation in Section 288a(b) must be given effect.

2. Another structural element of the IOIA points in the same direction. While Section 288a(b) treats international organizations and foreign sovereigns the "same" as to immunity from suit, other IOIA provisions treat them differently. Section 288f, for

example, provides that while "privileges, exemptions, and immunities granted to a foreign government . . . may be conditioned upon the existence of reciprocity by that foreign government," the "privileges, exemptions, and immunities of international organizations" under the IOIA generally are not. 22 U.S.C. § 288f; *see also id.* § 288d(b) (distinguishing between foreign governments and the persons they designate to serve as their representatives in or to international organizations).

The IOIA thus reflects Congress's deliberate determination that international organizations and foreign governments are equivalent with respect to immunity from suit (and various other purposes) but distinct for certain others. Treating them differently for purposes of immunity from suit—as the court of appeals' decision would do—would contravene that textually explicit sorting.

3. The D.C. Circuit has never addressed either of the two contextual indicators just discussed. Instead, its contrary assessment of the IOIA's structure in *Atkinson* was based entirely on a different feature of the IOIA: the President's authority to withdraw, limit, or condition any of the privileges and immunities that "any [international] organization" would otherwise enjoy under the IOIA. *See* 22 U.S.C. § 288. According to the court of appeals, this provision suggests "that Congress was content to delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances." *Atkinson*, 156 F.3d at 1341.

This inference is flawed. The presidential-authority provision does not grant the President the authority to establish default immunity rules. Instead, as its text indicates, Section 288 addresses *departures* from the generally applicable default rules—authorizing the President to make "organization- and function-specific exemptions." Pet. App. 13a (Pillard, J., concurring); *accord OSS Nokalva*, 617 F.3d at 763. And that is how the President has exercised the Section 288 authority—on a case-by-case basis, and never as a mechanism for updating the background rules applicable to international organization immunity.[5] In short, the default rules governing international organizations' immunity from suit follow the rules for foreign governments (as currently codified in the FSIA), whereas Section 288 authorizes the President to withdraw, limit, or condition privileges and immunities of specific organizations, as particular circumstances warrant.

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[5] *See, e.g.*, Exec. Order No. 12,425, 48 Fed. Reg. 28,069 (June 16, 1983) (granting to INTERPOL the privileges, exemptions, and immunities conferred by the IOIA, except those provided by Sections 2(c), portions of Sections 2(d) and 3, and Sections 4 through 6); Exec. Order No. 12,359, 47 Fed. Reg. 17,791 (Apr. 22, 1982) (granting to the International Food Policy Research Institute the privileges, exemptions, and immunities conferred by the IOIA except those provided by Sections 2(a), 2(b), 2(c), part of 2(d), and 7(b)); Exec. Order No. 11,718, 38 Fed. Reg. 12,797 (May 14, 1973) (granting to INTELSAT only certain privileges, exemptions, and immunities provided by the IOIA); Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962) (designating and withholding certain immunities from the Inter-American Tropical Tuna Commission, the Great Lakes Fishery Commission, and the International Pacific Halibut Commission).

That dichotomy serves salutary purposes. Some of the IOIA's default rules, as noted above, confer static, absolute immunity on international organizations. Others, such as the "same immunity" provision, may evolve over time and provide less than complete immunity. Either way, there are good reasons to authorize the President to make organization-specific exceptions. Section 288 itself identifies some—namely, "abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities" provided in the IOIA. 22 U.S.C. § 288. The "functions" performed by a particular organization may also render some aspect of the IOIA's default regime inappropriate. *Id.* But none of this overcomes the plain text of the "same immunity" provision or otherwise renders it unnecessary for the IOIA's default rule regarding immunity from suit to track the current law of foreign sovereign immunity.

C. The IOIA's Purpose And Drafting History Confirm That The "Same Immunity" Provision Incorporates The Current Law Of Foreign Sovereign Immunity

Given the clarity of the IOIA's text and structure, there is no need to consult other sources of statutory meaning. But insofar as the Court chooses to inspect the "same immunity" provision's purpose and drafting history, those sources "confirm[]" what "the text alone" expresses—that the provision incorporates the law of foreign sovereign immunity as it currently stands. *See Mohamad v. Palestinian Auth.*, 566 U.S. 449, 460 (2012).

1. Congress's "basic purpose" in enacting the IOIA was "to confer upon international organizations, and officers and employees thereof, privileges and immunities *of a governmental nature*." S. Rep. No. 79-861, at 1 (1945) (emphasis added); *accord* H.R. Rep. No. 79-1203, at 1 (1945). "With respect to immunity from suit" in particular, "the privileges, exemptions, and immunities extended international organizations are those accorded foreign governments under similar circumstances." S. Rep. No. 79-861, at 4; *see also* 91 Cong. Rec. 12,432 (Dec. 20, 1945) ("[O]rganization[s] made up of a number of foreign governments, as well as our own . . . should enjoy the same status as an embassy of . . . [a foreign] government.").

The logic of Congress's decision to link international organizations with foreign governments, and to provide that they should enjoy equivalent immunity from suit going forward, is apparent. International organizations are created by sovereign states and are comprised "entirely or principally of states." Restatement (Third) of Foreign Relations Law § 221 (1987); *see also The Oxford Handbook of International Organizations*, at v-vi (Jacob Katz Cogan, et al. eds., 2016). A foreign state should be treated the same in U.S. courts whether it acts on its own or through an organization it helped to create.

Indeed, Congress's conclusion that the "same" rules should govern international organization and foreign sovereign immunity from suit ensures that as the latter law evolves, states cannot evade legal accountability merely "by acting through international organizations." *OSS Nokalva*, 617 F.3d at

764. Under the D.C. Circuit's interpretation of Section 288a(b), for instance, the "Canadian government" would be "subject to suit in United States courts for disputes arising from its commercial activities here, but the Great Lakes Fishery Commission—of which the United States and Canada are the sole members—[would be] immune from suit." Pet. App. 16a (Pillard, J., concurring). Or, to take another example, a compilation of states acting through the IFC would be immune from suit based on a bad loan that it made in tandem with a bank owned by a single state, while the state-owned partner could be held liable in a U.S. court for the same transaction. *See, e.g.*, *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 102, 117 (2d Cir. 2016) (sovereign wealth fund not immune under FSIA from securities fraud claim); *Batra v. State Bank of India*, 2016 WL 3029957, at *5 (S.D.N.Y. May 25, 2016) (state-owned bank may be sued for taking unlawful debt-collection actions "a private commercial bank" might take).

As the United States has explained, there is "no reason" for such incongruities. Br. for the United States as Amicus Curiae at 10, *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465); *see also OSS Nokalva*, 617 F.3d at 764 (denouncing such "anomalous result[s]"). "[A] group of states acting through an international organization" should not be "entitled to a broader immunity than its member states enjoy when acting alone." *OSS Nokalva*, 617 F.3d at 764. International organizations have no right to be uniquely above the law.

2. The court of appeals in *Atkinson* brushed aside these concerns. Quoting a fragment of the IOIA's legislative history—in which a Senate committee stated that the IOIA would allow the President to adjust the immunity a designated organization enjoys if it "'engage[d], for example, in activities of a commercial nature'"—the court of appeals hypothesized that Congress intended Section 288 to be the sole mechanism for "updating the immunities of international organizations in the face of changing circumstances," such as commercial activity of the kind the FSIA later exempted from protection. *Atkinson*, 156 F.3d at 1341 (quoting S. Rep. No. 79-861, at 2).

As an initial matter, the court of appeals simply misread the sentence it quoted. The Senate Committee was not "speaking about 'commercial activities' as that term is now defined in the FSIA"—that is, "either a regular course of commercial conduct or a particular commercial transaction or act." *See* Aaron I. Young, *Deconstructing International Organization Immunity*, 44 Geo. J. Int'l L. 311, 343 & n.215 (2012) (citing 28 U.S.C. § 1603(d) (2006)). Rather, Congress intended for the President to be able to respond where a designated international organization (or its employees) engaged in *unauthorized* activity, such as starting a side business unrelated to its official function. *See, e.g.*, 91 Cong. Rec. 12,530 (Dec. 21, 1945) ("It is a very hypothetical case, . . . that representatives of Great Britain, for instance, who would be assigned to headquarters of the [United Nations] would open up a shipping business in Boston or San Francisco. They just do not operate that way."); *id.* (President handles "law enforcement" and

"can withdraw the privileges from the employees of [a] foreign organization" if it "starts functioning here and goes beyond the scope for which it was created, let us say starts into business over here"). That Congress intended the President to police abuses of official status sheds no light on whether or when Congress believed international organizations should be immune from suit based on what we now consider to be legitimate commercial conduct, let alone whether organizational immunity from suit should track foreign sovereign immunity.

But even if the Senate Report had been referring to "commercial activity" as that term is used in the FSIA, it would not support the court of appeals' theory. After all, the decisional law of foreign sovereign immunity in 1945 did not include any categorical exception for commercial acts. Thus, Congress at the time could have believed that "commercial activities" were an "example" of an area in which the President might limit a particular designated organization's immunity compared to the immunity a foreign sovereign would receive. S. Rep. No. 79-861, at 2. But that obviously does not mean that if foreign sovereigns were later deemed subject to suit based on their commercial activities, the default rule for international organization suit immunity would not move along with that development.[6]

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[6] Congress, in fact, later noted its understanding that the IOIA tracked that development. When amending the Foreign Corrupt Practices Act (FCPA), Congress explained that "international organizations . . . generally have the same immunity as foreign governments, and the [FSIA] provides that foreign governments are not immune for actions taken in connection

3. Indeed, the Congress that enacted the IOIA specifically rejected a proposal to lock in a rule that international organizations were entitled to absolute immunity from suit, subject only to the President's Section 288 authority. The original House version of the Act would have provided international organizations "immunity from suit and every form of judicial process." H.R. 4489, 79th Cong. § 2(b) (as introduced, Oct. 24, 1945). The Senate, however, rejected this phrasing in favor of the "cross-reference" to the law of foreign sovereign immunity that appears in the "current formulation of [Section 288a(b)]." *See* Pet. App. 14a-15a (Pillard, J., concurring) (citing H.R. 4489, 79th Cong. § 2(b) (as reported by S. Comm. on Fin., Dec. 18, 1945)). The Court should not "read back into [a statute] the very . . . statutory language that [Congress] discarded in favor of other language." *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (quotation omitted).

This Court's decision in *Trammel v. United States*, 445 U.S. 40 (1980), cements this analysis. In that case, the Court considered the scope of the evidentiary privilege established by Federal Rule of Evidence 501. The Judicial Conference Advisory Committee on the Rules of Evidence had proposed that Congress adopt a set of nine specific privileges that would have codified then-existing common law rules. *Id.* at 47. But Congress rejected that proposal. In-

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with their commercial activities." H.R. Rep. No. 105-802, at 13 (1998) (citation omitted) (describing the impact of an amendment to the FCPA); *see also Bell v. New Jersey*, 461 U.S. 773, 784 (1983) (view of a later Congress can have "persuasive value").

stead, Congress provided in Rule 501 that privilege claims are governed by "[t]he common law—as interpreted by United States courts in the light of reason and experience." Fed. R. Evid. 501. The Court understood this drafting history to "manifest[] an affirmative intention [by Congress] *not* to freeze the law of privilege." *Trammel*, 445 U.S. at 47 (emphasis added). "Its purpose rather was . . . to leave the door open to change." *Id.* Here, by rejecting specific, absolute immunity language, that was likewise Congress's obvious intent regarding the IOIA.

II. EVEN IF THE IOIA LOCKED IN THE LAW OF FOREIGN SOVEREIGN IMMUNITY AS OF 1945, THAT LAW WOULD REQUIRE TRACKING THE FSIA

Even if the court of appeals were right that the IOIA gives international organizations "the same" suit immunity "as [was] enjoyed by foreign governments" in 1945, that would not change the ultimate outcome here. Applying the law of 1945—which required judicial deference to the political branches' views at the time of the lawsuit—would lead right back to the FSIA.

A. The Immunity Rule For Foreign Governments In 1945 Was Not Absolute Immunity But Deference To The Political Branches

1. Until the period between the two World Wars, courts in the United States generally "regarded themselves as free to decide" questions about foreign sovereign immunity "as they would any other issue of common law, basing their judgments on domestic,

maritime, and international law principles." G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1, 27-28 (1999) (citing *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 135-47 (1812), and *Underhill v. Hernandez*, 168 U.S. 250, 252-54 (1897)). And courts making such assessments almost always held that "a sovereign c[ould] []not, without [its] consent, be made a respondent" in our courts. *Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004) (quotation omitted). Thus, for example, this Court held in 1926 that "a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire" enjoyed sovereign immunity, *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 570 (1926), despite "the view of the [State] Department" to the contrary, *The Pesaro*, 277 F. 473, 479-80 n.3 (S.D.N.Y. 1921).

By the time the IOIA was enacted, however, the law of foreign sovereign immunity had changed from a substantive doctrine to a rule of deference to the political branches. In *Ex parte Republic of Peru*, 318 U.S. 578 (1943), the Court granted the Republic of Peru's motion to prohibit a district court from continuing to exercise jurisdiction over a Peruvian vessel. *Id.* at 581-82. The Court held that after the State Department requested immunity on behalf of the vessel, the district court should have "relinquished" jurisdiction. *Id.* at 588. Bowing to suggestions "to shift responsibility for determining foreign sovereign immunity issues from the federal and state courts to the State Department," White, 85 Va. L. Rev. at 138, the Court held that a State Depart-

ment suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of Government" that the case may not proceed. *Ex parte Peru*, 318 U.S. at 589.

Two years later, in *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), the Court reaffirmed that political-branch immunity determinations controlled. *Hoffman* presented a fact pattern materially identical to that in *Berizzi Bros.* But although the Court in *Berizzi Bros.* had granted sovereign immunity to a merchant ship owned by a foreign government, the Court in *Hoffman* denied such immunity. *Id.* at 38. Stressing that the State Department had "[n]ever allowed a claim of immunity" where a foreign sovereign owned but was not in possession of a vessel that was being used for commercial purposes, the Court concluded that it was "not for the courts . . . to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.* at 36.

2. This Court's later explication of this IOIA-era precedent confirms that deference to the political branches—not any particular substantive rule, let alone an absolute-immunity rule—was the operative law of foreign sovereign immunity when the IOIA was enacted. As the Court recently put it, courts at the time "'consistently . . . deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction' over particular actions against foreign sovereigns." *Altmann*, 541 U.S. at 689 (alteration in original) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)); *see also Republic of Iraq v. Beaty*, 556 U.S. 848, 857 (2009) (*Ex parte Peru* and

Hoffman established that granting or denying immunity was "the case-by-case prerogative of the Executive Branch"); *Samantar v. Yousuf*, 560 U.S. 305, 311-12 (2010) (similar).

Faced with this recent case law, the majority below dismissed it as mere "dicta." Pet. App. 6a. But that is plainly incorrect. In *Altmann*, for instance, this Court held that the FSIA applies to pre-FSIA conduct partly *because* courts have long "'deferred to the [immunity] decisions of the political branches.'" 541 U.S. at 689, 696 (quoting *Verlinden*, 461 U.S. at 486). At any rate, *Ex parte Peru* and *Hoffman* speak for themselves. They make clear that at the time the IOIA was enacted, the rule of deference to the political branches was "controlling." *Hoffman*, 324 U.S. at 38; *accord Ex parte Peru*, 318 U.S. at 589.

B. Deference To The Political Branches Would Require Application Of The FSIA

Applying the "same" framework that prevailed in 1945 for deciding foreign sovereign immunity claims—namely, deference to the political branches' views—would dictate that the FSIA governs whether international organizations are immune from suit.

1. Since the Tate Letter's issuance in 1952, the "official policy" of the Executive Branch has been the "restrictive theory" of sovereign immunity. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 698, 703 (1976) (opinion of White, J.). Congress codified that restrictive theory in the FSIA, which is now the political branches' authoritative statement of the scope of foreign sovereigns' immunity from suit. And because a court applying 1945

immunity law must "defer" to that political branch determination, 1945 law would direct the court to the FSIA.

2. The court of appeals suggested that even if the courts in 1945 granted the political branches primacy over foreign sovereign immunity, the IOIA still confers "complete immunity" on international organizations because the Executive Branch at that time always requested immunity "whenever a foreign sovereign was sued." Pet. App. 6a. That is a puzzling assertion in light of the Court's 1945 *Hoffman* decision, which denied claimed immunity because the State Department did not recognize it. *See supra* at 6, 39. Nor is *Hoffman* the only pre-1945 example of the State Department declining to request immunity on behalf of a foreign government. *See, e.g.*, *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 71 (1938); *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 200, 203 (S.D.N.Y. 1929); *The Pesaro*, 277 F. at 479 n.3; *Lamont v. Travelers Ins. Co.*, 24 N.E.2d 81, 86 (N.Y. 1939). And where the State Department did not suggest immunity, courts denied it. *See, e.g.*, *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d at 200, 203; *Ulen & Co. v. Bank Gospodarstwa Krajowego (Nat'l Economic Bank)*, 24 N.Y.S.2d 201, 204, 206 (App. Div. 1940).

More fundamentally, the court of appeals' suggestion that applying a rule of deference to the political branches would require courts to follow the State Department's view as of 1945—as opposed to the political branches' view as of today—flies in the face of precedent. This Court has held that when applying

the rule of deference, courts must defer to "the most recent [political branch] decision—namely, the FSIA." *Altmann*, 541 U.S. at 696.

The court of appeals' position also makes no sense. Recall the *reason* that courts in 1945 deferred to the political branches' positions on immunity from suit: Immunity then (as now) was viewed as a foreign policy question reflecting "*current* political realities." *Altmann*, 541 U.S. at 696 (emphasis added). That being so, what should matter even under the court of appeals' construction of the IOIA are *today's* political realities—not those that prevailed more than a half century ago.

A rule requiring courts to ascertain what the Truman Administration's State Department would have thought about a modern claim of sovereign immunity by a particular international organization in a particular case would also be inherently unworkable. It would demand "rarified historical speculation," *Altmann*, 541 U.S. at 713 (Breyer, J., concurring), with guess stacked on top of guess. Courts confronted with commercial activities in which foreign sovereigns never engaged before 1945—for instance, maintaining investment funds to participate in emerging securities markets—would first have to imagine whether the political branches would have thought such activities deserving of immunity in general. If so, courts would then have to surmise whether the State Department would have deemed the specific defendant worthy of immunity. This inquiry would be especially fanciful with respect to the majority of international organizations (like the IFC) that did not even exist in 1945, and were not created

or designated under the IOIA until after the State Department had adopted the "restrictive" view of sovereign immunity in 1952. No rational Congress would have enacted such a regime.

* * *

In the end, the notion that courts in 2018 should attempt to determine what Executive Branch officials in 1945 would have thought about a particular claim of immunity simply illuminates why the IOIA rejects a static view of sovereign immunity from suit in the first place. Congress instead sensibly adopted a rule requiring courts to apply the law in existence *at the time of suit*—a task for which courts are fully equipped and that accords with sovereign immunity's nature as a doctrine that tracks contemporary realities. The IOIA accomplishes that objective by providing that international organizations enjoy "the same immunity from suit . . . as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). The "immunity from suit" that "is enjoyed by foreign governments" is set forth in the FSIA, which means that the FSIA likewise governs the IFC's claim of immunity here.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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STATUTORY ADDENDUM

RELEVANT STATUTES

22 U.S.C. § 288:

"International organization" defined; authority of President.

For the purposes of this subchapter, the term "international organization" means a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation, and which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter. The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this subchapter (including the amendments made by this subchapter) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity. The President shall be authorized, if in his judgment such action should be justified by reason of the abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities provided in this subchapter or for any other reason, at any time to revoke the designation of any international organization under this section, whereupon the international organization in question shall cease to be classed as an international organization for the purposes of this subchapter.

22 U.S.C. § 288a:

Privileges, exemptions, and immunities of international organizations.

International organizations shall enjoy the status, immunities, exemptions, and privileges set forth in this section, as follows:

(a) International organizations shall, to the extent consistent with the instrument creating them, possess the capacity—

(i) to contract;

(ii) to acquire and dispose of real and personal property;

(iii) to institute legal proceedings.

(b) International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

(c) Property and assets of international organizations, wherever located and by whomsoever held, shall be immune from search, unless such immunity be expressly waived, and from confiscation. The archives of international organizations shall be inviolable.

(d) Insofar as concerns customs duties and internal-revenue taxes imposed upon or by reason of importation, and the procedures in connection therewith; the registration of foreign agents; and the treatment of official communications, the privileges, exemptions,

and immunities to which international organizations shall be entitled shall be those accorded under similar circumstances to foreign governments.

22 U.S.C. § 288b:

Baggage and effects of officers and employees exempted from customs duties and internal revenue taxes.

Pursuant to regulations prescribed by the Commissioner of U.S. Customs and Border Protection with the approval of the Secretary of the Treasury, the baggage and effects of alien officers and employees of international organizations, or of aliens designated by foreign governments to serve as their representatives in or to such organizations, or of the families, suites, and servants of such officers, employees, or representatives shall be admitted (when imported in connection with the arrival of the owner) free of customs duties and free of internal-revenue taxes imposed upon or by reason of importation.

22 U.S.C. § 288c:

Exemption from property taxes.

International organizations shall be exempt from all property taxes imposed by, or under the authority of, any Act of Congress, including such Acts as are applicable solely to the District of Columbia or the Territories.

22 U.S.C. § 288d:

Privileges, exemptions, and immunities of officers, employees, and their families; waiver.

(a) Persons designated by foreign governments to serve as their representatives in or to international organizations and the officers and employees of such organizations, and members of the immediate families of such representatives, officers, and employees residing with them, other than nationals of the United States, shall, insofar as concerns laws regulating entry into and departure from the United States, alien registration and fingerprinting, and the registration of foreign agents, be entitled to the same privileges, exemptions, and immunities as are accorded under similar circumstances to officers and employees, respectively, of foreign governments, and members of their families.

(b) Representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees except insofar as such immunity may be waived by the foreign government or international organization concerned.

22 U.S.C. § 288e:

Personnel entitled to benefits.

(a) Notification to and acceptance by Secretary of State of personnel

No person shall be entitled to the benefits of this subchapter, unless he (1) shall have been duly notified to and accepted by the Secretary of State as a representative, officer, or employee; or (2) shall have been designated by the Secretary of State, prior to formal notification and acceptance, as a prospective representative, officer, or employee; or (3) is a member of the family or suite, or servant, of one of the foregoing accepted or designated representatives, officers, or employees.

(b) Deportation of undesirables

Should the Secretary of State determine that the continued presence in the United States of any person entitled to the benefits of this subchapter is not desirable, he shall so inform the foreign government or international organization concerned, as the case may be, and after such person shall have had a reasonable length of time, to be determined by the Secretary of State, to depart from the United States, he shall cease to be entitled to such benefits.

(c) Extent of diplomatic status

No person shall, by reason of the provisions of this subchapter, be considered as receiving diplomatic status or as receiving any of the privileges incident thereto other than such as are specifically set forth herein.

22 U.S.C. § 288f:

Applicability of reciprocity laws.

The privileges, exemptions, and immunities of international organizations and of their officers and employees, and members of their families, suites, and servants, provided for in this subchapter, shall be granted notwithstanding the fact that the similar privileges, exemptions, and immunities granted to a foreign government, its officers, or employees, may be conditioned upon the existence of reciprocity by that foreign government: *Provided,* That nothing contained in this subchapter shall be construed as precluding the Secretary of State from withdrawing the privileges, exemptions, and immunities provided in this subchapter from persons who are nationals of any foreign country on the ground that such country is failing to accord corresponding privileges, exemptions, and immunities to citizens of the United States.

22 U.S.C. § 288f-1:

European Space Agency and Organization of Eastern Caribbean States; extension of privileges, exemptions, and immunities to members.

The provisions of this subchapter may be extended to the European Space Agency and to the Organization of Eastern Caribbean States (including any office established in the United States by that organization) in the same manner, to the same extent, and subject to the same conditions, as they may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such

participation or making an appropriation for such participation.

22 U.S.C. § 288f-2:

African Union; extension of privileges, exemptions, and immunities.

(a) The provisions of this subchapter may be extended to the African Union and may continue to be extended to the International Labor Organization and the United Nations Industrial Development Organization in the same manner, to the same extent, and subject to the same conditions, as they may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation.

(b) Under such terms and conditions as the President shall determine, consistent with the purposes of this subchapter, the President is authorized to extend, or enter into an agreement to extend, to the African Union Mission to the United States of America, and to its members, the privileges and immunities enjoyed by diplomatic missions accredited to the United States, and by members of such missions, subject to corresponding conditions and obligations.

22 U.S.C. § 288f-3:

Immunities for International Committee of the Red Cross.

The International Committee of the Red Cross, in view of its unique status as an impartial humanitarian body named in the Geneva Conventions of 1949 and assisting in their implementation, shall be considered to be an international organization for the purposes of this subchapter and may be extended the provisions of this subchapter in the same manner, to the same extent, and subject to the same conditions, as such provisions may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation.

22 U.S.C. § 288f-4:

International Union for Conservation of Nature and Natural Resources; extension of privileges, exemptions, and immunities.

The International Union for Conservation of Nature and Natural Resources shall be considered to be an international organization for the purposes of this subchapter and may be extended the provisions of this subchapter in the same manner, to the same extent, and subject to the same conditions, as such provisions may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation.

22 U.S.C. § 288f-5:

European Central Bank; extension of privileges, exemptions, and immunities.

The provisions of this subchapter may be extended to the European Central Bank in the same manner, to the same extent, and subject to the same conditions, as they may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation.

22 U.S.C. § 288f-6:

Global Fund to Fight AIDS, Tuberculosis and Malaria; extension of privileges, exemptions, and immunities.

The provisions of this subchapter may be extended to the Global Fund to Fight AIDS, Tuberculosis and Malaria in the same manner, to the same extent, and subject to the same conditions, as they may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation.

22 U.S.C. § 288f-7:

Office of the High Representative in Bosnia and Herzegovina and the International Civilian Office in Kosovo; extension of privileges, exemptions, and immunities.

The provisions of this subchapter may be extended to the Office of the High Representative in Bosnia and Herzegovina (and to its officers and employees) or the International Civilian Office in Kosovo (and to its officers and employees) in the same manner, to the same extent, and subject to the same conditions, as such provisions may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation. Any such extension may provide for the provisions of this subchapter to continue to extend to the Office of the High Representative in Bosnia and Herzegovina (and to its officers and employees) or the International Civilian Office in Kosovo (and to its officers and employees) after that Office has been dissolved.

22 U.S.C. § 288g:

Organization of American States; extension of privileges and immunities to members.

Under such terms and conditions as he shall determine, the President is hereby authorized to extend, or to enter into an agreement extending, to the representatives of member states (other than the United States) to the Organization of American States and to permanent observers to the Organization of American

States, and to members of the staffs of said representatives and permanent observers, the same privileges and immunities, subject to corresponding conditions and obligations, as are enjoyed by diplomatic envoys accredited to the United States.

22 U.S.C. § 288h:

Commission of European Communities; extension of privileges and immunities to members.

Under such terms and conditions as he shall determine and consonant with the purposes of this section, the President is authorized to extend, or to enter into an agreement extending, to the Mission to the United States of America of the Commission of the European Communities, and to members thereof, the same privileges and immunities subject to corresponding conditions and obligations as are enjoyed by diplomatic missions accredited to the United States and by members thereof. Under such terms and conditions as the President may determine, the President is authorized to extend to other offices of the Commission of the European Communities which are established in the United States, and to members thereof—

(1) the privileges and immunities described in the preceding sentence; or

(2) as appropriate for the functioning of a particular office, privileges and immunities, equivalent to those accorded consular premises, consular officers, and consular employees, pursuant to the Vienna Convention on Consular Relations.

22 U.S.C. § 288i:

Liaison Office of the People's Republic of China; extension of privileges and immunities to members.

Under such terms and conditions as he shall determine and consonant with the purposes of this section, the President is authorized to extend to the Liaison Office of the People's Republic of China in Washington and to the members thereof the same privileges and immunities subject to corresponding conditions and obligations as are enjoyed by diplomatic missions accredited to the United States and by members thereof.

22 U.S.C. § 288j:

International Development Law Institute.

For purposes of the International Organizations Immunities Act (22 U.S.C. 288 and following), the International Development Law Institute shall be considered to be a public international organization in which the United States participates under the authority of an Act of Congress authorizing such participation.

22 U.S.C. § 288k:

Extension of certain privileges, exemptions, and immunities to Hong Kong Economic and Trade Offices.

(a) Application of International Organizations Immunities Act

The provisions of the International Organizations Immunities Act (22 U.S.C. 288 et seq.) may be extended to the Hong Kong Economic and Trade Offices in the same manner, to the same extent, and subject to the same conditions as such provisions may be extended to a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation.

(b) Application of international agreement on certain State and local taxation

The President is authorized to apply the provisions of Article I of the Agreement on State and Local Taxation of Foreign Employees of Public International Organizations, done at Washington on April 21, 1994, to the Hong Kong Economic and Trade Offices.

(c) "Hong Kong Economic and Trade Offices" defined

The term "Hong Kong Economic and Trade Offices" refers to Hong Kong's official economic and trade missions in the United States.

22 U.S.C. § 288l:

The Holy See.

Under such terms and conditions as the President shall determine, the President is authorized to extend, or to enter into an agreement to extend, to the Permanent Observer Mission of the Holy See to the United Nations in New York, and to its members, the privileges and immunities enjoyed by the diplomatic missions of member states to the United Nations, and their members, subject to corresponding conditions and obligations.

No. 17-1011

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, ET AL.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the court of appeals correctly held that the International Organizations Immunities Act, 22 U.S.C. § 288 *et seq.*, does not incorporate subsequent developments in the law of foreign-state immunity, including those enacted in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603 *et seq.*

CORPORATE DISCLOSURE STATEMENT

International Finance Corporation was established in 1956 by its founding multilateral treaty, the IFC Articles of Agreement. As a public international organization, IFC is owned by the governments of 184 nations.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

STATEMENT 3

A. The Establishment of Post-World War II International Organizations 3

B. The International Organizations Immunities Act of 1945 5

C. International Finance Corporation 8

D. Procedural History 10

SUMMARY OF ARGUMENT 14

ARGUMENT 18

I. SECTION 288a OF THE IOIA ESTABLISHES A SUBSTANTIVE RULE OF VIRTUALLY ABSOLUTE IMMUNITY. 18

A. When The IOIA Was Enacted, Federal Common Law Accorded Foreign States Virtually Absolute Immunity 18

B. The IOIA Adopts For International Organizations The Common-Law Rule Of Virtually Absolute Immunity That Applied To Foreign States In 1945. 25

1. Section 288a(b) codifies the federal common-law rule of virtually absolute immunity. 25

2. The statutory structure and purpose confirm that Section 288a(b) establishes a fixed rule of virtually absolute immunity. 31

3. Petitioners' remaining textual arguments lack merit. 37

C. The Foreign Sovereign Immunities Act Confirms That International Organizational Immunity Is Not Subject To Later Alterations In Foreign-State Immunity. 39

II. EXECUTIVE BRANCH PRACTICE DEMONSTRATES THAT SECTION 288a ESTABLISHED A FIXED RULE OF VIRTUALLY ABSOLUTE IMMUNITY. 43

III. SUBJECTING INTERNATIONAL ORGANIZATIONS TO RESTRICTIVE IMMUNITY WOULD THREATEN THEIR ABILITY TO CARRY OUT THEIR MISSIONS. 50

A. Applying The Restrictive Theory Of Sovereign Immunity To International Organizations Would Defeat The Purposes For Which These Organizations Receive Immunity. 50

B. Subjecting IFC And Other International Organizations To Suit Under The FSIA Will Impede Their Ability To Perform Their Missions. 53

C. Other Legal Doctrines Cannot Be Counted On To Eliminate These Risks To The Missions Of International Organizations. 57

CONCLUSION 61

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987) 28

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) ..... passim

Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) 26

Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335 (D.C. Cir. 1998) 49, 50

The Attualita, 238 F. 909 (4th Cir. 1916) 20

Barrett v. United States, 423 U.S. 212 (1976) 29

Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562 (1926) 20, 24

Bond v. United States, 134 S. Ct. 2077 (2014) 46

Broadbent v. Organization of American States, 628 F.2d 27 (D.C. Cir. 1980) 48

Brzak v. United Nations, 597 F.3d 107 (2d Cir. 2010) 7

Carcieri v. Salazar, 555 U.S. 379 (2009) 49

Carr v. United States, 560 U.S. 438 (2010) 29

City of Newport v. Fact Concerts, Inc.,
453 U.S. 247 (1981) 28

Costello v. INS, 376 U.S. 120 (1964) 29

The Davis, 77 U.S. (10 Wall.) 15 (1869) 20

DHS v. MacLean, 135 S. Ct. 913 (2015) 35

Dole Food Co. v. Patrickson,
538 U.S. 468 (2003) 29

Epic Sys. Corp. v. Lewis,
138 S. Ct. 1612 (2018) 27

F.D.I.C. v. Meyer, 510 U.S. 471 (1994) 28

FAA v. Cooper, 566 U.S. 284 (2012) 29

FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 31

Filarsky v. Delia, 566 U.S. 377 (2012) 27

Filártiga v. Peña-Irala,
630 F.2d 876 (2d Cir. 1980) 56

First City, Texas-Houston, N.A. v. Rafidain Bank, 150 F.3d 172 (2d Cir. 1998) 43

Frend v. United States,
100 F.2d 691 (D.C. Cir. 1938) 37

Gilbert v. United States, 370 U.S. 650 (1962) 26

Guaranty Tr. Co. of New York v. United States, 304 U.S. 126 (1938) 19, 24, 31

Hawkins v. Barney's Lessee, 30 U.S. (5 Pet.) 457 (1831) 27

International Refugee Org. v. Republic S.S. Corp., 93 F. Supp. 798 (D. Md. 1950) 33

Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018) 12, 55, 56

King v. Burwell, 135 S. Ct. 2480 (2015) 16, 31, 34

Kingdom of Roumania v. Guaranty Tr. Co. of New York, 250 F. 341 (2d Cir. 1918) 20

Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) 3, 12, 18, 55

McNeill v. United States, 563 U.S. 816 (2011) 29

Mead Corp. v. Tilley, 490 U.S. 714 (1989) 36

Medellin v. Texas, 552 U.S. 491 (2008) 47

Mendaro v. World Bank, 717 F.2d 610 (D.C. Cir. 1983) 9

Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) 27

Morissette v. United States, 342 U.S. 246 (1952) 15, 26

The Navemar, 303 U.S. 68, 74 (1938) 20

Neder v. United States, 527 U.S. 1 (1999) 26

New York State Dept. of Soc. Servs. v. Dublino, 413 U.S. 405 (1973) 34

OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015) 59

Permanent Mission of India v. City of New York, 551 U.S. 193 (2007) 24

Pulliam v. Allen, 466 U.S. 522 (1984) 28, 29

Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014) 43

Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) 58

Republic of Mexico v. Hoffman, 324 U.S. 30 (1945) 20, 24

Ex parte Republic of Peru, 318 U.S. 578 (1943) 20

Samantar v. Yousuf, 560 U.S. 305 (2010) ..... passim

The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) 19

Sekhar v. United States, 570 U.S. 729 (2013) 26

Skilling v. United States, 561 U.S. 358 (2010) 26

Standard Oil Co. of N.J. v. United States,
221 U.S. 1 (1911) 26

Taiwan v. United States District Court for the N. Dist. of Cal.,
128 F.3d 712 (9th Cir. 1997) 33

Tower v. Glover, 467 U.S. 914 (1984) 27

United States v. Wilson, 503 U.S. 329 (1992) 29

Utility Air Regulatory Grp. v. EPA,
134 S. Ct. 2427 (2014) 31

Verlinden B.V. v. Central Bank of Nigeria,
461 U.S. 480 (1983) 6, 19, 21

West Virginia Univ. Hosps., Inc. v. Casey,
499 U.S. 83 (1991) 43

Yates v. United States, 135 S. Ct. 1074 (2015) 29

STATE CASES

Curran v. City of New York,
77 N.Y.S.2d 206 (Sup. Ct. 1947) 33

FEDERAL STATUTES

Alien Tort Statute, 28 U.S.C. § 1350 ..... passim

Civil Rights Act of 1866, 14 Stat. 27 29

42 U.S.C. § 1981 29

42 U.S.C. § 1982 29

42 U.S.C. § 1983 27

Federal Tort Claims Act, 28 U.S.C. §§ 2674, 1346(b) 28

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* ..... passim

28 U.S.C. § 1603 ..... 41, 42, 58

28 U.S.C. § 1604 ..... 39, 60

28 U.S.C. § 1605 39

28 U.S.C. § 1605(a) 42

28 U.S.C. § 1605(a)(2) 13, 57, 58

28 U.S.C. § 1606 42

28 U.S.C. § 1607 39

28 U.S.C. § 1610(a) 40

28 U.S.C. § 1611(a) 41, 42

International Organizations Immunities Act, Pub. L. No. 79-291, 59 Stat. 669 (22 U.S.C. § 288 *et seq.*) ..... passim

22 U.S.C. § 288 ..... 6, 30, 31, 48

22 U.S.C. § 288a 18, 33, 34, 43

22 U.S.C. § 288a(b) ..... passim

22 U.S.C. § 288a(c) 33, 37, 43

22 U.S.C. § 288a(d) 38, 39

22 U.S.C. § 288b 16, 37

22 U.S.C. § 288c 38

22 U.S.C. § 288d(a) 38, 39

22 U.S.C. § 288d(b) 38

22 U.S.C. § 288e(c) 38

22 U.S.C. § 288f 23

22 U.S.C. § 288f-3 7

The Rules of Decision Act, 28 U.S.C. § 1652 27

22 U.S.C. § 282f 12

22 U.S.C. § 282g 9

22 U.S.C. § 290g-7 48

22 U.S.C. § 290m-1 7

28 U.S.C. § 1331 12

28 U.S.C. § 1332 12

FEDERAL REGULATIONS

19 C.F.R. § 145.2 39

19 C.F.R. § 148.81 39

19 C.F.R. § 148. 87 39

19 C.F.R. § 148.89 39

28 C.F.R. § 5.303 39

Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946) 32, 45, 46

Exec. Order No. 9863, 12 Fed. Reg. 3559 (May 31, 1947) 46

Exec. Order No. 10,680, 21 Fed. Reg. 7647 (Oct. 2, 1956) 9

Exec. Order No. 11,966, 42 Fed. Reg. 4331 (Jan. 24, 1977) 47

LEGISLATIVE MATERIALS

91 Cong. Rec. 12,530 (Dec. 21, 1945) 5

91 Cong. Rec. 12,532 (Dec. 21, 1945) 36

136 Cong. Rec. S7602 (June 7, 1990) 37

H.R. 4489, 79th Cong. § 2(b) (1945) 36

H.R. Rep. No. 79-1203 (1945) 35

H.R. Rep. No. 94-1487 (1976) 42

H.R. Rep. No. 105-802 (1998) 36

International Finance Corporation: Hearings on H.R. 6228 before H. Comm. on Banking and Currency, 84th Cong. 7 (1955) 9

International Finance Corporation: Hearings on S. 1894 before International Finance Subcomm. of S. Comm. on Banking and Currency, 84th Cong. (1955) 8

S. Rep. No. 79-861 (1945) ..... passim

S. Treaty Doc. No. 40, 102d Cong., 2d Sess. (1992) 48, 49

TREATIES AND INTERNATIONAL INSTRUMENTS

Articles of Agreement of the International Finance Corporation (1955) 8, 10

Constitution of the Food and Agriculture Organization, art. XVI (Legal Status) (1945) 34, 46

Constitution of the United Nations Educational, Scientific and Cultural Organisation art. XII, Nov. 16, 1945, 4 U.N.T.S. 275 46

Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 20, Oct. 14, 1966, 17 U.S.T. 1270 ..... 46, 47

Headquarters Agreement, League of Nations Journal 1422 (1926) 35, 36

International Labour Organization, Constitution art. 40 (1919) 46

U.N. Charter art. 105 (1945) 34, 44, 45

U.N. Convention on Privileges and Immunities (1946) 35

2 United Nations Relief And Rehabilitation Administration, *A Compilation of the Resolutions on Policy: First and Second Sessions of the UNRRA Council* 51, Resolution No. 32 (1944) 5, 34

TREATISES AND JOURNALS

2 Green Haywood Hackworth, *Digest of International Law* § 173 (1941) 24

Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 Am. J. Int'l L. 828 (1947) 37

Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917 (1980) 9

Rosalyn Higgins, *Problems and Process – International Law and How We Use It* (1994) 22

Edward C. Okeke, *Jurisdictional Immunities of States and International Organizations* (2018) 22

Restatement (Second) of Foreign Relations § 83 cmt. e 22

Restatement (Third) of Foreign Relations Law, pt. IV, Ch. 6 22

Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* § 7 (2012) 30

Henry G. Schermers & Niels M. Blokker, *International Institutional Law* § 1610 (5th rev. ed. 2011) ..... passim

Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 Va. J. Int'l L. 53 (1995) 51

2B Sutherland Statutory Construction (7th ed. West 2012) 30

OTHER AUTHORITIES

British Diplomatic Privileges (Extension) Act, 7 & 8 Geo. 6, C.44; Nov. 17, 1944, Sched. Part. I.1, reprinted in 39 Am. J. Int'l L. Supp. 163 (1945) 35

Closing Address to the Bretton Woods Conference, July 22, 1944 3

Consortium X v. Switzerland, Final appeal judgment, BGE 130 I 312, ILDC 344 (CH 2004), 2nd July 2004, Switzerland 52

Firma Baumeister Ing. Richard L v. O., judgment of 14 December 2004, File No. 100b53/04y (Austrian Supreme Court) 51

1 *Foreign Relations of the United States: Diplomatic Papers, 1945, General: The United Nations*, The Acting Secretary of State to the Attorney General (Washington: Government Printing Office, 1967) 22, 23, 36

1 *Foreign Relations of the United States, 1947, General: The United Nations*, The Secretary of State to the Speaker of the House of Representatives (Washington: Government Printing Office, 1973) 44, 45

33 *Foreign Relations of the United States, 1964-1968, Organization and Management of Foreign Policy*, The Representative to the United Nations to President Johnson (Washington: Government Printing Office, 2004) 45

IFC, *Performance Standards on Environmental and Social Sustainability* 10

IFC Project Information Portal, *IFC Project Mapping*, https://disclosures.ifc.org/#/projectMapping 53

Investment & Finance Company of 11 January 1984 Limited v. UNICEF, No. U 2000 478 Ø, ILDC 64 (DK 1999) 52

Richard Nixon, Message to the Senate Transmitting Convention on the Privileges and Immunities of the United Nations, 1969 Pub. Papers 1037 (1969) 45

Stichting Mothers of Srebrenica v. United Nations, ¶ 4.2, Case No. 10/04437, 13 April 2012, Hoge Raad, ILDC 1760 (NL 2012) 52

U.S. Amicus Br., *American Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (S. Ct. 2007) 57

U.S. Amicus Br., *EM Ltd. v. Argentina*, 473 F.3d 463 (2d Cir. Apr. 5, 2006) (No. 06-0403-cv) 42, 49

U.S. Amicus Br., *Thai Lao Lignite (Thailand) Co. v. Lao People's Democratic Republic*, No. 13-495 (2d Cir. May 13, 2013), ECF No. 233 33

U.S. Br., *Guaranty Tr. Co. of New York v. United States*, 304 U.S. 126 (Mar. 26, 1938), 1938 WL 63887 24

U.S. Dep't of State, 9 Foreign Affairs Manual 402.3-7(M) 7

U.S. Dep't of State, *Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, The Secretary of State* 136, Pub. 2349, Conference Series 71 (June 26, 1945) (San Francisco Conference Report) 4, 5, 21, 34

U.S. Dep't of the Treasury, *Report to Congress from the Chairman of the National Advisory Council on International Monetary and Financial Policies* (2017) 53

U.S. Dep't of the Treasury, *Guidance for U.S. Positions on Multilateral Development Banks Engaging on Energy Projects and Policies* 54

U.S. Dep't of the Treasury, *Resource Center, Multilateral Development Banks* 7, 8, 54

World Bank, *Environment Matters at the World Bank: Rio+20* (2012) 10

INTRODUCTION

Preserving the broad immunity from suit that Congress provided in the International Organizations Immunities Act (IOIA) is a matter of vital importance to International Finance Corporation (IFC), its member states, and myriad other international organizations. After World War II, the United States and its allies created the World Bank, the United Nations, and IFC, among others, to advance their collective development and humanitarian interests. In the more than 70 years since, the United States has collaborated with other member states to further these interests throughout the world. These collective interests remain as important today as at any other time, and IFC plays a critical role in advancing them. The economic-development projects financed by IFC advance peace, stability and the national security interests of IFC's member states, including the United States, by alleviating extreme poverty and increasing shared prosperity.

IFC and organizations like it can take collective action because they are able to rely on immunity from suit for their core functions, including, critically, the immunity conferred by the IOIA. When Congress enacted the IOIA in 1945, it afforded international organizations "virtually absolute immunity" from suit in U.S. courts, including suits like petitioners'. Congress did so by adopting the common-law standards then governing the immunity afforded foreign sovereigns in U.S. courts. 22 U.S.C. § 288a(b); *Samantar v. Yousuf*,

560 U.S. 305, 311 (2010) (describing the scope of foreign-state immunity before 1952). But Congress did not adopt those common-law standards because it believed international organizations were equivalent to foreign sovereigns and should therefore receive whatever immunity was afforded foreign sovereigns. Congress adopted those standards for functional reasons: the United States and other member states recognized that international organizations must be able to carry out their missions without any one member state exerting undue influence over the organization through its courts. That protection enables member states with different political and judicial systems to pursue common goals. Without it, local interests or parochial viewpoints could undermine the organizations' multilateral cooperation and governance.

To be sure, in the years since 1945 the United States and other states have concluded that a narrower scope of foreign-sovereign immunity is most consistent with the principles of comity and reciprocity that govern such immunity. But no comparable evolution has occurred regarding immunity for international organizations. And for good reason. Restricting the broad IOIA immunity international organizations have long possessed—and subjecting their collective policy judgments to superintendence by U.S. courts and the looming threat of significant damages—would threaten the core functions of these organizations every bit as much now as it would have in 1945. It would also place enormous pressure on the organizations to avoid the risk of such claims rather than maximize the development impact of their work and pursue the activities their members expect them to take to fulfill their missions.

At the same time, restricting organizational immunity would spur lawsuits by foreign plaintiffs alleging injuries suffered in foreign countries because of actions taken in those countries by foreign entities that happen to be beneficiaries of international-organization loans. In requiring U.S. courts to adjudicate conduct that occurred entirely in another sovereign's territory and that should be adjudicated by that sovereign, these suits will threaten comity in precisely the same way as the Alien Tort Statute (ATS) suits that this Court has consistently rejected. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116-117 (2013).

When considered in light of the IOIA's structure and the purposes for which it was enacted, Section 288a(b) of the IOIA is best read as establishing a fixed rule of virtually absolute immunity for international organizations. This Court should therefore reject petitioners' effort to upend this settled understanding.

STATEMENT

A. The Establishment of Post-World War II International Organizations

As World War II drew to a close, the United States and its allies endeavored to create a post-war order that would foster international cooperation rather than nationalistic strife. International organizations were integral to that effort. As Treasury Secretary Henry Morgenthau explained, "the great lesson taught by the war" was that "the wisest and most effective way to protect our national interests is through international cooperation—that is to say, through united effort for the attainment of common goals." Closing Address to

the Bretton Woods Conference, July 22, 1944, at IV. In keeping with its role as the world's most powerful and vital nation, the United States led the way in establishing these international organizations and defining their missions.

In 1944, the Bretton Woods conference resulted in the creation of the first multilateral development institutions: the International Monetary Fund (IMF) and the World Bank. The IMF was initially charged with establishing an international monetary system, and the World Bank was initially charged with rebuilding war-ravaged Europe. In 1945, the United States hosted the San Francisco Conference, at which the attending nations adopted a charter establishing the United Nations (U.N.). Today, in similar ways, these organizations address current needs; for instance, the World Bank, IFC and others are focused on helping countries like Afghanistan, Iraq, and Somalia to address the aftermath of conflict and crisis.

The United States and other member states understood that international organizations would require immunity from suit to function effectively. The Secretary of State explained that because an international organization would be governed by, and receive contributions from, "all of the member states," the organization should "clearly not [be] subject to the jurisdiction or control of any one of them." U.S. Dep't of State, *Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, The Secretary of State* 136, Pub. 2349, Conference Series 71

(June 26, 1945) (San Francisco Conference Report).[1] The need for immunity from suit was "particularly important" with respect to the country in which an organization was headquartered. Absent a guarantee of immunity, the host country's courts could exercise considerable control over the organization's functions. The United States thus recognized that it "share[d] the interest of all Members in seeing that no state hampers the work of the [o]rganization[s] through the imposition of unnecessary local burdens" such as litigation in its courts. *Id.*

These organizations' charters (or other governing instruments) accordingly committed member states to guarantee the organizations absolute immunity with respect to fulfillment of their functions. See, e.g., 2 United Nations Relief And Rehabilitation Administration, *A Compilation of the Resolutions on Policy: First and Second Sessions of the UNRRA Council* 51, Resolution No. 32 (1944) (UNRRA Resolution No. 32). Anticipating that the U.N. and other organizations would be headquartered in the United States, the Executive Branch concluded that legislation was needed to ensure that domestic law guaranteed these organizations the immunity that their charters contemplated. See *San Francisco Conference Report* 137; 91 Cong. Rec. 12,530 (Dec. 21, 1945).

B. The International Organizations Immunities Act of 1945

1. To establish a domestic-law rule of immunity for all international organizations, Congress enacted the

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[1] https://babel.hathitrust.org/cgi/pt?id=uiug.30112046487697;view=1up;seq=2.

IOIA. S. Rep. No. 79-861, at 2 (1945) (*Senate Report*). The IOIA confers on international organizations, and their officers and representatives, a wide range of privileges and immunities, including immunity from suit and exemptions from certain duties and taxes. 22 U.S.C. § 288 *et seq.*

The provision at issue in this case, Section 288a(b), provides that "[i]nternational organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). At the time, foreign governments were afforded virtually absolute immunity from suit pursuant to common-law principles espoused by the Executive Branch and adopted by the courts. See, e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Specifically, foreign states were absolutely immune from suit, in the absence of consent, with narrow exceptions involving vessels not in the state's possession and certain property. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-712 (1976) (appending Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen., 26 Dept. State Bull. 984 (May 19, 1952) ("Tate Letter")). In 1952, well after the IOIA's enactment, the United States began according foreign states only "restrictive" immunity, under which they were not immune for suits based on their commercial activities. See Part I.A, *infra*.

Section 288 authorizes the President to designate through executive order the international organizations that are entitled to the IOIA's immunities. 22 U.S.C. § 288. Section 288 also authorizes the Presi-

dent to "withhold or withdraw from any [designated international] organization . . . any of the . . . immunities provided for" in the statute "or to condition or limit" the immunity if circumstances warranted. *Ibid.* The President also may revoke an organization's immunity "for any . . . reason." *Ibid.*

2. Since 1945, the President has designated numerous international organizations as entitled to the immunities conferred by the IOIA. U.S. Dep't of State, 9 Foreign Affairs Manual 402.3-7(M). Some organizations, such as the U.N., also possess additional immunities conferred by self-executing treaties. See *Brzak v. United Nations*, 597 F.3d 107, 111 (2d Cir. 2010). Others have additional immunity conferred by organization-specific statutes incorporating treaty-based immunities into United States law. See, e.g., 22 U.S.C. § 290m-1. Still other organizations do not possess immunity under incorporating statutes or self-executing treaties, and therefore depend entirely on the IOIA. See, e.g., 22 U.S.C. § 288f-3 (International Committee of the Red Cross).

3. The legal provisions described above establish the legal rights of the international organizations to which they apply. The Executive Branch also interacts directly with those organizations in which the United States is a member, participating in governance and ensuring that the organizations further United States interests. The Treasury Department "leads the [United States'] engagement" with multilateral development banks like the World Bank and IFC. U.S. Dep't of the Treasury, *Resource Center: Multilateral Development*

Banks.[2] The United States is a leading contributor to development banks, "ensur[ing] that [it] can help shape the global development agenda." *Ibid.* Treasury representatives serve as Executive Directors on the institutions' governing boards and determine the United States' positions with respect to their projects and policies, after consultation with the State Department and other agencies.

C. International Finance Corporation

1. In 1956, the United States led the effort to establish IFC as an affiliate international organization of the World Bank. Because the World Bank was not designed to promote private-sector investment in developing countries, President Eisenhower explained that IFC would "provide, in association with local and foreign private investors, risk capital for" development projects "when other sources of funds are not available on reasonable terms." *International Finance Corporation: Hearings on S. 1894 before International Finance Subcomm. of S. Comm. on Banking and Currency*, 84th Cong. 3 (1955) (*Hearings*) (message of the President). IFC thus facilitates development projects that would be impossible without its support, particularly in the world's poorest countries.

2. IFC is governed by its Articles of Agreement (Articles), which were drafted in 1955, against the backdrop of the IOIA, and modeled on the World Bank's 1944 Articles of Agreement. See Articles of Agreement of the International Finance Corporation, *Hearings* 4

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[2] https://www.treasury.gov/resource-center/international/development-banks/Pages/index.aspx

(Articles).[3] Upon IFC's creation, 30 states signed the Articles and contributed capital. *International Finance Corporation: Hearings on H.R. 6228 before H. Comm. on Banking and Currency*, 84th Cong. 7 (1955) (statement of Treasury Secretary). Today, IFC is owned by 184 member states and funded through their contributions, issuance of bonds, and its own investments. IFC is governed by a Board of Governors and a Board of Directors composed of representatives of the member states. Articles, art. IV.

IFC's Articles provide broad immunities "[t]o enable [IFC] to fulfill the functions with which it is entrusted." Articles, art. VI § 1. The Articles permit IFC to be sued when forgoing immunity furthers its core mission. Specifically, IFC may be sued by purchasers of securities and other direct commercial counterparties. See Articles, art. 6 § 3(vi); Letter from Roberts B. Owen, State Department Legal Adviser, to Leroy D. Clark, Gen. Counsel, EEOC (June 24, 1980), *in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917, 918 (1980); Pet. App. 9a; *Mendaro v. World Bank*, 717 F.2d 610, 617 (D.C. Cir. 1983).

The Articles' immunity provisions are incorporated into U.S. law. 22 U.S.C. § 282g. Upon IFC's creation, the President designated IFC as an international organization entitled to IOIA immunities. Exec. Order No. 10,680 (Oct. 2, 1956). The Executive Order further provided that the designation "is not intended to

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[3] Current version available at: https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/ifc+governance/articles/about+ifc+-+ifc+articles+of+agreement.

abridge in any respect privileges, exemptions, and immunities which such corporation may have acquired or may acquire by treaty or Congressional action; nor shall such designation be construed to affect in any way the applicability of the provisions of section 3, Article VI, of the Articles of Agreement." *Ibid.*

3. IFC, as a collective institution reflecting the values of its member states, has long been committed to sustainable development. Member states have required IFC not only to avoid projects that may harm the environment, but also to "help[] clients do business in a sustainable way as part of their long term success." World Bank, *Environment Matters at the World Bank: Rio+20*, 49 (2012). IFC has developed market-leading performance standards for managing environmental and social risks, and it generally requires clients to comply with the standards within a reasonable period after IFC's investment. See IFC, *Performance Standards on Environmental and Social Sustainability* 1, ¶ 1; 9, ¶ 12. Typically, these performance standards are far more rigorous than national or local laws require. When a project falls below IFC's standards, IFC engages in a collaborative process to determine how to help its client achieve compliance. *Id.* at 12, ¶ 24. If the client continues to fail to meet IFC's standards, IFC's lending agreements provide various remedial options. C.A.J.A. 254, 269-270, 296, 303.

D. Procedural History

1. In 2008, IFC provided financing to Coastal Gujarat Power Limited (CGPL), an Indian corporation developing a power plant in India. C.A.J.A. 1047. At the time, India faced severe power shortages that threatened its economic progress. C.A.J.A. 1048. Ultimately,

IFC provided a $450 million loan, representing approximately 15% of the project's total debt funding. C.A.J.A. 25. IFC imposed on CGPL environmental standards more rigorous than those required under Indian law. C.A.J.A. 1048. Those standards resulted in "lower emissions of air pollutants" relative to other coal plants. *Ibid.* The project was also designed to emit less greenhouse gas than other coal-based plants. *Ibid.*

2. Petitioners, a group of Indian nationals, filed a complaint with IFC's Compliance Advisor Ombudsman (CAO), alleging that the power plant had caused environmental harms.[4] C.A.J.A. 470. Although the CAO process contemplates both a dispute-resolution and a compliance-audit phase, petitioners refused to engage in dispute resolution, so the CAO proceeded to the compliance-audit phase. The CAO issued findings and suggestions addressing how IFC might better ensure compliance with its self-imposed internal standards.

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[4] In order to provide communities around projects IFC finances with a platform for their voices to be heard, the World Bank Group created the CAO as its independent recourse mechanism. The CAO responds to complaints made by communities about IFC projects and performs three functions: dispute resolution, compliance and advisory. The dispute-resolution function brings the client-borrower and the complainant(s) together in an effort to resolve differences. If the complainant or the client-borrower refuses to participate in dispute resolution, the CAO may proceed to a compliance-audit phase. Under its compliance function, CAO reviews IFC's compliance with its self-imposed internal performance standards, makes recommendations, and monitors responses to those recommendations.

Relying heavily on those findings, petitioners sued IFC in April 2015. Petitioners allege that the plant's construction and operation has damaged the air quality and surrounding marine ecosystem. See, e.g., C.A.J.A. 11-22. It is undisputed that CGPL and its parent company designed, constructed, and operate the project. See, e.g., C.A.J.A. 89-90. Petitioners, however, did not sue CGPL or its parent in U.S. courts, presumably because they could not have done so. See 28 U.S.C. §§ 1331, 1332; cf. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018) ("[F]oreign corporations may not be defendants in suits brought under the" ATS.); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-125 (2013). Nor did petitioners sue any of the project's other lenders.

Instead, petitioners sued only IFC, as the sole lender headquartered in the United States. C.A.J.A. 11; 22 U.S.C. § 282f. Despite IFC's lack of management control over CGPL, petitioners allege that IFC tortiously harmed them by failing to ensure that CPGL and its parent complied with the standards set forth in IFC financing agreements (to which petitioners are not parties). C.A.J.A. 36-44.

Petitioners seek significant damages and medical monitoring for a proposed class of Indian nationals. They also seek an injunction "directing the IFC to . . . exercise all . . . leverage practicable" to induce CGPL and its parent to alter the plant design and "ensure" that they, and other companies to which IFC is not

even a lender, conduct their operations in a manner satisfactory to petitioners.[5] C.A.J.A. 42-43, 89-90.

3. IFC moved to dismiss on several grounds, including that IFC was immune under the IOIA. In response, petitioners contended that because the IOIA provides that international organizations "shall enjoy the same immunity from suit" as foreign governments, 22 U.S.C. § 288a(b), international organizations enjoy only the "restrictive" immunity to which foreign states are now entitled under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1602 *et seq.* Petitioners contended that their suit fell within the FSIA's exception to foreign-state immunity for certain commercial activities, 28 U.S.C. § 1605(a)(2). The district court dismissed the suit.

4. The court of appeals affirmed. Pet. App. 1a-22a. As relevant here, the court applied its decades-old precedent holding that "foreign organizations receive the immunity that foreign governments enjoyed at the time the IOIA was passed, which was 'virtually absolute immunity.'" *Id.* at 4a-5a (citations omitted). The court observed that "[s]hould appellants' suit be permitted, every loan the IFC makes to fund projects in developing countries could be the subject of a suit in Washington," and it "does not seem an exaggeration" that "the floodgates would be open." *Id.* at 11a.

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[5] At CGPL's request, all foreign lenders recently agreed to accept prepayment of CGPL's outstanding indebtedness.

SUMMARY OF ARGUMENT

Congress afforded virtually absolute immunity to international organizations when it enacted Section 288a(b) of the IOIA in 1945. Since that time, international organizations headquartered or operating in the United States have carried out their missions in reliance on the settled understanding—shared by Congress, the Executive Branch, and the courts—that the IOIA confers immunity from suits, like petitioners', that challenge an international organization's exercise of its core functions. Abrogating that understanding now in favor of restrictive immunity would defeat the purpose for which these organizations were granted immunity in the first place and undermine their ability to pursue their important development objectives. It would also open U.S. courts to a potential flood of lawsuits by foreign plaintiffs seeking redress for alleged injuries suffered abroad at the hands of foreign funding recipients, where the only connection to the United States is that defendant international organization happens to be headquartered here. The best reading of the statutory text, considered in light of the IOIA's structure and the purposes for which it was enacted, forecloses the harmful, counterproductive result that petitioners seek.

I. The IOIA provides that "international organizations . . . shall enjoy the same immunity from suit . . . as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). When the IOIA was enacted, foreign states enjoyed "virtually absolute immunity" pursuant to well-established common-law principles recognized in the first instance by the Executive Branch and adopted

by the courts. See *Samantar v. Yousuf*, 560 U.S. 305, 311-312 (2010).

Section 288a(b) incorporates that common-law standard to define international organizational immunity. Because Section 288a(b) adopts the common law, the meaning of its reference to "the same immunity . . . as is enjoyed by foreign governments" must be determined as of the time of enactment. See, e.g., *Morissette v. United States*, 342 U.S. 246, 263 (1952). Petitioners' contrary argument relies heavily on the reference canon, but that canon is entirely inapposite, as it applies only to provisions that incorporate another *statute* by reference. Section 288a(b) therefore establishes for international organizations an unchanging rule of virtually absolute immunity that does not fluctuate with subsequent changes in foreign-state immunity.

That construction is necessary to give effect to Congress's understanding of the purposes of international organizational immunity—purposes that are completely different from those animating foreign-state immunity. *Senate Report* 3. Foreign-state immunity is accorded by one coequal sovereign to another as a matter of comity and reciprocity. International organizations needed a separate grant of immunity precisely because they are *not* sovereigns, and possess neither territory nor governmental authority. As non-sovereign collective bodies, organizations need immunity to safeguard their pursuit of their member states' collective objectives, free of undue interference by the courts of any one state. In the IOIA, then, Congress adopted the common-law rule then applicable to foreign states not because it believed that organizational immunity should be inextricably linked to that of foreign states,

but because adopting the then-prevailing substantive rule furthered the distinct purposes of international organizational immunity.

The statutory structure and purpose confirm that Section 288a(b) establishes a fixed substantive rule. See *King v. Burwell*, 135 S. Ct. 2480, 2490-2491 (2015). Several provisions of the IOIA—Section 288a(b)'s express statement that organizations may waive their immunity, Section 288's authorization of the President to "limit" but not expand the baseline immunity established in Section 288a(b), and Section 288b's provision of immunity from discovery—are fundamentally inconsistent with a fluctuating rule of immunity. So too is Congress's expressed intent that the IOIA would ensure compliance with existing—and unchanging—international obligations to accord nearly absolute immunity to certain international organizations.

The FSIA did not change the IOIA's substantive rule of virtually absolute immunity. By its terms, the FSIA does not apply to international organizations. *Samantar*, 560 U.S. at 320-325. And the immunity rules that it establishes cannot sensibly be applied to international organizations, creating significant uncertainties that Congress surely would have resolved had it enacted the FSIA with organizations in mind.

II. The Executive Branch's historical practice cannot be reconciled with the interpretation of Section 288a(b) that petitioners and the government now advance. Had international organizational immunity drastically constricted in 1952 with the adoption of restrictive immunity for foreign states in the Tate Letter, the U.N. and other organizations would have suddenly lost the absolute immunity that the United States and

other member states had collectively agreed to accord them. Yet the Executive Branch gave no hint that such a radical shift had occurred. That long course of conduct is far more telling than the government's assertion of the opposite view before this Court. That position is simply the latest iteration of a shifting litigation posture and deserves no deference.

III. Subjecting international organizations to restrictive immunity would defeat the very purpose of granting them immunity in the first place. IFC and other multilateral development banks routinely use the tools of commerce to advance their decidedly noncommercial collective missions of promoting economic development and international stability. Should petitioners prevail, they and future plaintiffs will argue that IFC's use of the tools of commerce subjects its core development activities to suit under the FSIA's commercial activities exception. Such suits would be irreconcilable with the purposes of organizational immunity, as they will invite national courts to second-guess the organization's policy judgments—which reflect the considered collective judgment of the member states—and burden its collectively contributed finances.

Permitting such suits would have dramatic implications for IFC and other development institutions. IFC is currently involved in hundreds of development projects, including in the most challenging locations in the world. International organizations like IFC offer prospective plaintiffs a particularly attractive slate of characteristics: self-imposed, rigorous internal standards, deep pockets, and a jurisdictional hook to get their claims before a U.S. court. Restricting IFC's immunity would invite myriad lawsuits seeking to hold it liable for everything from allegedly adverse project

outcomes to a host government's illegal conduct. Cf. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). The prospect of becoming enmeshed in contentious litigation threatening billions in damages would force IFC to reevaluate its operations and policies to minimize litigation risk—a perspective that would be inimical to its development mission. More broadly, permitting such suits would open U.S. courts to foreign-focused challenges with only the most tenuous connection to the United States. Those suits will raise the same policy and comity concerns as the similar ATS lawsuits against U.S. corporations that proliferated until this Court limited them.

ARGUMENT

I. SECTION 288a OF THE IOIA ESTABLISHES A SUBSTANTIVE RULE OF VIRTUALLY ABSOLUTE IMMUNITY.

A. When The IOIA Was Enacted, Federal Common Law Accorded Foreign States Virtually Absolute Immunity.

The IOIA provides that "[i]nternational organizations, their property and their assets . . . shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). At the time of the IOIA's enactment, the phrase "the same immunity . . . as is enjoyed by foreign governments" had a definite, well-established meaning under the common law: it conferred what this Court has characterized as "virtually absolute immunity," i.e., immunity from all suits, with narrow excep-

tions (described below). See *Samantar*, 560 U.S. at 311.

1. In 1945, foreign-state immunity was governed by common-law principles that were suggested in the first instance by the Executive Branch and then adopted by courts. *See Samantar*, 560 U.S. at 311-312 (citing *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)). The rules of foreign-state immunity were "a matter of grace and comity" among coequal sovereigns, informed by considerations of foreign relations and reciprocity. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). At the time, the common-law rule was clear: the United States "generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Ibid.*; *Samantar*, 560 U.S at 312.

In 1952, the State Department described the applicable principle of immunity as "virtually absolute":

> According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. . . . The classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of the United States.

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711-712 (1976) (quoting Tate Letter). Accordingly, in the years preceding the IOIA's enactment, this Court uniformly declared that "upon the principle of comity foreign sovereigns and their public property are held not to be amenable to suit in our courts without their consent." *E.g., Guaranty Tr. Co. of New York v. United States*, 304 U.S. 126, 134 (1938).

Immunity extended to foreign states' commercial activities. This Court explained in cases involving state-owned vessels engaged in commercial activities that "a vessel of a friendly government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire, and as such is immune from suit in the courts of admiralty of the United States." *The Navemar*, 303 U.S. 68, 74 (1938); accord *Ex parte Republic of Peru*, 318 U.S. 578, 580 (1943); *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 570 (1926). The same was true in non-admiralty suits involving commercial contracts. See *Kingdom of Roumania v. Guaranty Tr. Co. of New York*, 250 F. 341, 343 (2d Cir. 1918).

Foreign-state immunity was characterized as "virtually" absolute because narrow exceptions existed for suits concerning real property that was not diplomatic or consular property, and for suits concerning vessels owned but not possessed by foreign states. *Alfred Dunhill*, 425 U.S. at 712; *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36-37 (1945).[6] Apart from these narrow exceptions, foreign states possessed complete immunity.

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[6] *Hoffman* explained that when a vessel was owned but not possessed by a foreign state, the Executive and the courts have historically not recognized immunity. 324 U.S. at 36-37. That rule had origins in nineteenth-century admiralty law, *The Davis*, 77 U.S. (10 Wall.) 15 (1869), and reflected concern that immunity would leave no party responsible for the vessel. *The Attualita*, 238 F. 909, 911 (4th Cir. 1916). Moreover, such suits did not involve the "indignity" of "oust[ing] the possession of a foreign state." *Hoffman*, 324 U.S. at 38.

2. a. When Congress adopted the common-law standard of virtually absolute foreign-state immunity in the IOIA, it did so to provide international organizations with the protection they would need to function effectively. As the Executive Branch explained in 1945, in connection with the U.N.'s establishment, broad immunity would be necessary "to insure the smooth functioning of the [o]rganization free from interference by any state." *San Francisco Conference Report* 159. Moreover:

> The United Nations, being an organization of all of the member states, is clearly not subject to the jurisdiction or control of any one of them .... The problem will be particularly important in connection with the relationship between the United Nations and the country in which it has its seat. ... The United States shares the interest of all Members in seeing that no state hampers the work of the Organization through the imposition of unnecessary local burdens.

Ibid.

Contrary to petitioners' assertion (Br. 32), Congress did not believe that international organizations were equivalent to foreign sovereigns and should therefore receive whatever immunity foreign sovereigns received. International organizations are not sovereigns. They do not possess their own territory and jurisdiction. And they are not granted immunity for the reasons foreign states are granted immunity—i.e., to further principles of comity and reciprocity. See *Verlinden*, 461 U.S. at 486. Rather, international organizations are granted immunity to ensure that these organizations, as entities with their own international and

legal personalities and composed of numerous member states, will be able to carry out their missions without interference from any one state.

As one scholar has explained: "[T]o assimilate [international organizations] to states . . . is not correct. Their basis of immunity is different. The relevant test under general international law is whether an immunity from jurisdiction . . . is necessary for the fulfilment of the organization's purposes," not whether it was acting "in sovereign authority." Rosalyn Higgins, *Problems and Process – International Law and How We Use It* 93 (1994); see *Restatement (Second) of Foreign Relations* § 83 cmt. e ("The immunity of an international organization is not determined by the rules . . . as to the immunity of a foreign state. States do not recognize in international organizations the sovereignty which is generally deemed the basis of those rules. Likewise, considerations of reciprocity, which afford a practical basis for the immunity of a foreign state, are inapplicable in the case of an international organization."); see also *Restatement (Third) of Foreign Relations Law*, Part IV, Ch. 6 Introductory Note (1987); Edward C. Okeke, *Jurisdictional Immunities of States and International Organizations* 352 (2018); Henry G. Schermers & Niels M. Blokker, *International Institutional Law* § 1610, at 1033 (5th rev. ed. 2011).

b. When it enacted the IOIA, Congress was well aware of the distinct reasons for granting immunity to international organizations. *Senate Report* 4. Indeed, the State Department urged the IOIA's enactment specifically to ensure that international organizations had the immunity necessary to function effectively. 1 *Foreign Relations of the United States: Diplomatic Papers, 1945, General: The United Nations*, The Acting Secre-

tary of State to the Attorney General 1559 (Washington: Government Printing Office, 1967) (*1945 Foreign Relations*). Congress explained that it enacted the IOIA "to facilitate fully the functioning of international organizations in this country." *Senate Report* 4. And the IOIA's text confirms Congress's understanding that international organizational immunity rested on different principles than foreign-state immunity. Section 288f provides that international organizations "shall" enjoy immunity "notwithstanding" reciprocity rules governing foreign-state immunity—even though reciprocity was at the time a primary consideration in deciding whether a foreign state should be given immunity. 22 U.S.C. § 288f (immunities shall be provided "notwithstanding" that "immunities granted to a foreign government . . . may be conditioned upon the existence of reciprocity by that foreign government"); *Senate Report* 5-6.

3. In 1952, after the IOIA's enactment, the State Department announced "a shift in policy" in the Tate Letter: the Executive would thereafter apply the "restrictive" theory in considering foreign-government requests for recognition of immunity. *Alfred Dunhill*, 425 U.S. at 714 (appending Tate Letter); *id.* at 712. By 1952, foreign sovereigns had increasingly distinguished between a state's "sovereign" and "private" acts, concluding that when a foreign state acted in the same manner as a private party in the market, those acts lacked a sovereign character. *Id.* at 711. Given this change in international practice, the United States concluded that principles of comity and reciprocity no longer justified absolute immunity. *Ibid.* Foreign states would therefore no longer receive immunity for

suits arising from their "private acts," including commercial activities. *Id.* at 713.

The Tate Letter says nothing about international organizations, and its discussion of the reasons for narrowing foreign-state immunity is founded only on comity and reciprocity—considerations that are irrelevant to international organizational immunity. Petitioners and the government identify no evidence that the Executive Branch believed it was narrowing the scope of international organization immunity when it issued the Tate Letter.[7]

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[7] The Tate Letter announced a sharp break with prior policy. The government nonetheless suggests (Br. 17-18) that *Hoffman* had already moved toward restrictive sovereign immunity. That is incorrect. *Hoffman* rested on two grounds, neither of which concerned commercial activities: (1) courts had uniformly rejected immunity for state-owned vessels not in the state's possession, see note 6, *supra*, and (2) the Executive did not suggest immunity. 324 U.S. at 35-36, 38. The government observes (Br. 17) that the State Department had previously urged denying immunity to state-owned vessels used for commercial purposes. But this Court rejected that position. *Berizzi Bros.*, *supra*. So did the Justice Department: it declined to advance State's position in this Court. 2 Green Haywood Hackworth, *Digest of International Law* § 173, at 430 (1941).

Petitioners go even further (Br. 37-40), contending that no substantive rule of immunity existed in 1945. This Court's decisions and the Executive's statements refute that assertion. See, e.g., *Alfred Dunhill*, 425 U.S. at 714 (appending Tate Letter); *Samantar*, 560 U.S. at 311; *Permanent Mission of India v. City of New York*, 551 U.S. 193, 199 (2007); U.S. Br., *Guaranty Tr. Co. of New York v. United States*, 304 U.S. 126 (Mar. 26, 1938), 1938 WL 63887, at *8.

B. The IOIA Adopts For International Organizations The Common-Law Rule Of Virtually Absolute Immunity That Applied To Foreign States In 1945.

Section 288a(b) provides that international organizations and their property "shall enjoy the same immunity from suit" as "is enjoyed" by foreign governments. Because the common law provided foreign states with virtually absolute immunity in 1945, Section 288a(b) unquestionably conferred on international organizations the same virtually absolute immunity possessed by foreign states when it was enacted.

The question before this Court is whether Section 288a(b) sets forth a fixed substantive rule of virtual absolute immunity for international organizations as the D.C. Circuit has held for decades, or whether it instead incorporates by reference all post-1945 fluctuations in foreign-state immunity. Two aspects of Section 288a(b) demonstrate that the provision establishes a fixed rule. First, statutes that, like Section 288a(b), adopt common-law rules are construed to adopt the common law as it existed at the time of enactment absent clear evidence to the contrary. Second, the statutory context, structure and purpose confirm that Section 288a(b) established a fixed rule.

1. Section 288a(b) codifies the federal common-law rule of virtually absolute immunity.

a. Petitioners and the government overlook the significance of a critical feature of Section 288a(b): the *source* of the rule that it adopts. In defining an international organization's immunity from suit, Section 288a(b) codifies a specific common-law standard—not a

standard set forth in another federal statute. *Samantar*, 560 U.S. at 311. Under the common law of foreign-state immunity in 1945, the "same immunity from suit . . . as is enjoyed by foreign governments" meant virtually absolute immunity. See pp. 18-24, *supra*. By using that formulation, Congress was able to codify for international organizations the substantive standards applicable to foreign states, without spelling out every nuance of the common law.[8]

When Congress enacts a statute that adopts a common-law concept, courts must presume that Congress "adopt[ed] the cluster of ideas that *were attached* to each borrowed word in the body of learning from which it was taken" at the time of enactment, absent clear evidence of contrary intent. *Morissette v. United States*, 342 U.S. 246, 263 (1952) (emphasis added); see, e.g., *Neder v. United States*, 527 U.S. 1, 21 (1999); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 494-495 (1940). This Court has therefore consistently construed statutes adopting common-law concepts by looking to the common law at the time of the statute's enactment. See *Skilling v. United States*, 561 U.S. 358, 407 (2010); *Sekhar v. United States*, 570 U.S. 729, 733 (2013); *Gilbert v. United States*, 370 U.S. 650, 655

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[8] Petitioners contend (Br. 24) that Congress could have expressly provided "the specific level of immunity it thought existed at the time." But that is what Congress did. While foreign states generally had absolute immunity, the common law also included more nuanced rules for vessels and certain foreign-state property. See pp. 19-20, *supra*; *Alfred Dunhill*, 425 U.S. at 713. Adopting the common-law standards enabled Congress to capture these nuances. Indeed, Congress often chooses to adopt a common-law rule rather than fully articulating the rule.

(1962) (examining "the common-law meaning of forgery at the time the 1823 statute was enacted"); cf. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (explaining general principle that congressional intent is measured by reference to law at time of enactment).

The Court also looks to the common law at the time of enactment when a statute incorporates broader common-law doctrines, including immunity doctrines. For example, the Court has held that 42 U.S.C. § 1983 incorporates immunities under "the common law as it existed when Congress passed § 1983 in 1871." *Filarsky v. Delia*, 566 U.S. 377, 384 (2012). In determining whether an official sued today under Section 1983 should have immunity, therefore, the Court undertakes "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Tower v. Glover*, 467 U.S. 914, 920 (1984). The Court then decides whether Congress intended that common-law rule to apply, rather than canvassing subsequent evolution in the common law. *Filarsky*, 566 U.S. at 389. Similarly, in construing the scope of "appropriate equitable relief" under ERISA, a statute enacted against the backdrop of the law of trusts, the Court examines what relief would have been "typically available in equity" at the time of the divided bench—not the relief that would be considered "equitable" and available today.[9] *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993).

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[9] Petitioners' examples (Br. 20) are inapposite because they do not codify a principle with a specific common-law meaning. The Rules of Decision Act, 28 U.S.C. § 1652, is "no more than a declaration of what the law would have been without it," *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 464 (1831), i.e., a state-

This Court's cases have thus proceeded on the "important assumption" that the Congress that enacted a particular statute "w[as] familiar with common-law principles" at the time, and "that [it] likely intended these common-law principles to obtain, absent specific provisions to the contrary." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981); accord *Pulliam v. Allen*, 466 U.S. 522, 529 (1984). Because Section 288a(b) adopts the common-law rule governing foreign-state immunity, the scope of the "same immunity from suit . . . as is enjoyed by foreign states" should be determined by reference to the common law at the time of the IOIA's enactment.

b. Nothing in Section 288a(b)'s text suggests otherwise—much less provides clear evidence of a contrary legislative purpose. Petitioners rest their argument for a fluctuating standard of incorporation on Section 288a(b)'s use of the word "same," and its use of the present tense formulation "as is enjoyed." But those words will not bear that weight. The word "same" simply means "identical"; it does not indicate whether the quality of "sameness" should be measured at the time the statute is applied or at the time the statute was enacted.[10] And the present-tense phase "is en-

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ment that federal courts should apply state law when state law applies. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 162, (1987) (Scalia, J., concurring in the judgment). The Federal Tort Claims Act, 28 U.S.C. §§ 2674, 1346(b), simply waives the United States' immunity in certain cases, leaving the United States subject to the same state-law liability rules that apply to private parties. *F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994).

[10] Petitioners' reliance on the Civil Rights Act of 1866, which directs that African Americans receive "same" rights as "white

joyed" could refer either to the time of enactment or the time of application. Precisely because the present tense is susceptible to more than one interpretation, this Court has repeatedly held that the statutory context may demonstrate that the present tense refers to a time prior to the time in which the statute is applied.[11] See *McNeill v. United States*, 563 U.S. 816, 821 (2011) (construing present-tense language to refer to law at the time of a previous conviction, not the time of application); *Costello v. INS*, 376 U.S. 120, 125 (1964) ("the

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citizens," ignores the statute's different purpose and context. See Civil Rights Act of 1866, 14 Stat. 27; 42 U.S.C. §§ 1981, 1982. The whole point of the Civil Rights Act was to establish a rule of equal treatment based on the principle that persons of different races are equal before the law. That purpose could be vindicated only if African Americans enjoyed the same evolving rights as white citizens. See *Pullium*, 466 U.S. at 529. The IOIA is entirely different. *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) ("identical language may convey varying content when used in different statutes"); *FAA v. Cooper*, 566 U.S. 284, 292 (2012). It affords international organizations immunity to further the entirely distinct purpose of that immunity. See pp. 20-21, *supra*. That purpose is effectuated by reading the IOIA's reference to "the same" immunity to adopt the substantive common-law standard.

[11] The cases on which the government relies (Br. 14) are not to the contrary. Two concern statutes that use the *past* tense. *United States v. Wilson*, 503 U.S. 329, 333 (1992); *Barrett v. United States*, 423 U.S. 212, 216 (1976). *Carr v. United States*, 560 U.S. 438, 448 (2010), involved the very different question whether a criminal statute applied to conduct committed before the statute was enacted. In *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003), the Court construed the FSIA's use of present tense in light of the principle that sovereign status is determined on the *facts* existing at the time of suit.

tense of the verb 'be' is not, considered alone, dispositive").

Because neither Section 288a(b)'s use of the present tense nor its use of the word "same" requires that the statute be read in the manner petitioners propose, petitioners invoke the "reference canon." That canon, they assert, holds that whether a statute refers to a statutory rule as it existed at the time of enactment or the time of application depends not on the statute's tense, but on the generality or specificity of the referred-to statutory rule. Petitioners' reliance on the reference canon is misplaced. It applies when statutes "refer to another *act* and incorporate part or all of it by reference." 2B Sutherland Statutory Construction § 51:7 (7th ed. West 2012) (emphasis added) (*Sutherland*). Indeed, the treatise section on which petitioners rely (Br. 17) is entitled "*statutes* adopted by reference." *Id.* (emphasis added); accord Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* § 7, at 90 (2012). The reference canon has no application to statutes like Section 288a(b) that adopt common-law principles.

Indeed, far from supporting petitioners, *Sutherland* confirms that Section 288a(b) should be construed to adopt the virtually absolute immunity that foreign states had in 1945. *Sutherland* states that statutes that incorporate common-law principles adopt those principles as they existed at the time of enactment, and that subsequent changes in the common-law principles do not alter the "meaning and effect" of the legislation. *Sutherland* § 50.1; see *id.* § 50.2.

2. The statutory structure and purpose confirm that Section 288a(b) establishes a fixed rule of virtually absolute immunity.

a. Three aspects of the IOIA's structure confirm that in invoking the common law of virtually absolute foreign-state immunity, Congress intended to adopt an unchanging substantive rule. See *King v. Burwell*, 135 S. Ct. 2480, 2490-2491 (2015) ("the way different provisions in the statute interact" and the "statutory context" may remove any ambiguity otherwise inhering within the provision); see also *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) ("A statutory 'provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.'") (citation omitted); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000).

First, the interaction of Section 288a(b)'s two clauses demonstrates that the first clause establishes a substantive rule of immunity. While the first clause confers "the same immunity . . . as is enjoyed by foreign governments," the second clause provides that international organizations "may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. § 288a(b). If, as petitioners argue, the first clause merely incorporated by reference the *body* of foreign-state immunity law, it would have been superfluous to specify that international organizations could waive their immunity. That power was already a well-established part of the body of foreign-state immunity law. See, e.g., *Guaranty Trust*, 304 U.S. at 134.

Second, Section 288 demonstrates that Section 288a establishes a fixed substantive rule of immunity. Section 288 provides that the "President shall be authorized, in the light of the functions performed by any such international organization . . . to withhold or withdraw" immunity from such an organization, or to "condition or limit" or "at any time to revoke" the immunity conferred in Section 288a. 22 U.S.C. § 288. That authority to make case-specific judgments is inconsistent with a baseline rule that can be automatically altered wholesale by changes in the independent body of law governing foreign-state immunity. For one thing, Section 288 demonstrates that Congress contemplated that the scope of an organization's immunity might require adjustment, in light of both changing circumstances over time and the range of functions that various organizations fulfill. *Senate Report* 3-4. Congress chose to delegate authority to effect such changes to the Executive Branch, in the exercise of its foreign-relations expertise. The efficacy of that mechanism for organization-specific, circumstance-specific adjustments would be undermined by a baseline rule that would automatically change for all organizations any time foreign-state immunity changed.[12]

Even more to the point, authorizing the President to "limit," but not expand, an international organization's

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[12] Petitioners argue (Br. 29-30) that Section 288 does not permit the President to adjust organizational immunity across the board. But the text does not foreclose it. And the President often establishes immunity for multiple organizations in a single executive order. See, e.g., Exec. Order 9698 (Feb. 19, 1946). The President could also implement across-the-board changes through organization-specific orders.

immunity, 22 U.S.C. § 288, makes sense only if Section 288a(b) establishes a fixed rule of virtually absolute immunity. If Section 288a's scope could automatically be limited by a subsequent limitation of foreign-state immunity, the Executive would have no ability to broaden an organization's immunity beyond that newly narrowed baseline—even if doing so would be warranted by that organization's circumstances.[13]

Third, Section 288a(c) provides that "[t]he archives of international organizations shall be inviolable." 22 U.S.C. § 288a(c). That provision prohibits all compelled discovery. *Taiwan v. United States District Court for the N. Dist. of Cal.*, 128 F.3d 712, 718 (9th Cir. 1997); U.S. Amicus Br. 20-21, *Thai Lao Lignite (Thailand) Co. v. Lao People's Democratic Republic*, No. 13-495 (2d Cir. May 13, 2013), ECF No. 233. Had Congress thought that international organizations might eventually be subject to a wide range of suits in which they had not voluntarily waived their immunity, it would not have simultaneously granted them immunity from all compelled discovery.

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[13] By expressly establishing the procedures governing organizational immunity, these provisions demonstrate that Congress did not intend to incorporate pre-existing Executive Branch procedures used in cases involving foreign states. But cf. U.S. Br. 29-30. Executive practice does not suggest otherwise. While the Executive suggested immunity in a 1947 case, it does not appear to have done so thereafter, and any such practice had ended by 1960. Compare *Curran v. City of New York*, 77 N.Y.S.2d 206 (Sup. Ct. 1947), with *International Refugee Org. v. Republic S.S. Corp.*, 93 F. Supp. 798, 805 (D. Md. 1950) (finding immunity without an Executive suggestion); C.A.J.A. 1054-1055.

b. Section 288a(b)'s statutory purpose further confirms that the provision establishes a substantive rule of virtually absolute immunity. See *New York State Dept. of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-420 (1973) ("We cannot interpret federal statutes to negate their own stated purposes."); *King*, 135 S. Ct. at 2493 (same).

Congress enacted the IOIA to "enabl[e] this country to fulfill its commitments in connection with its membership in international organizations." *Senate Report* 3; see also *San Francisco Conference Report* 158-160. By 1945, the United States had entered into international agreements "in connection with the creation of [the United Nations Relief and Rehabilitation Agency (UNRRA)], the International Monetary Fund and International Bank, the Food and Agriculture Organization of the United Nations, and others." *Senate Report* 3. These treaties included "[p]rovisions . . . with respect to the problem of privileges and immunities." *Ibid.*

Many of those "provisions" committed the United States to guaranteeing virtually absolute immunity. For instance, the 1944 resolutions governing UNRRA stated, in language very similar to that used in Section 288a, that "the member governments [shall] accord to the Administration the facilities, privileges, immunities, and exemptions *which they accord to each other, including (a) Immunity from suit and legal process except with the consent* of" the organization. UNRRA Resolution No. 32 (emphasis added). Similarly, the United States agreed in 1945 to provide absolute immunity to the Food and Agriculture Organization (FAO). Constitution of the FAO, art. XVI (1945); see also U.N. Charter art. 105, ¶ 1 (committing to accord

"such privileges and immunities as are necessary for the fulfillment of its purposes") (1945); U.N. Convention on Privileges and Immunities art. II, § 2; *id.* art. IV, §§ 11-16 (1946) (providing U.N. with absolute immunity from suit).

Congress's purpose of enabling the United States to secure the necessary immunity for these organizations could be effectuated only with a substantive rule of virtually absolute immunity. Under petitioners' construction, however, the immunity from suit accorded by the IOIA could suddenly contract based on changes in foreign-state immunity—placing the United States in violation of its international commitments without advance warning, much less consideration by Congress. That would defeat the very purpose for which Congress enacted the statute. See *DHS v. MacLean*, 135 S. Ct. 913, 920 (2015) (rejecting "[a] broad interpretation of the word 'law' [that] could defeat the purpose of the whistleblower statute").

c. Finally, Congress understood the IOIA's protections to be "standard in light of" two "important precedents," both of which conferred absolute immunity from suit. *Senate Report* 3. The House and Senate Reports explained that the IOIA was consistent with both the 1926 League of Nations headquarters agreement, and the 1944 British Diplomatic Privileges (Extension) Act. *Ibid.*; H.R. Rep. No. 79-1203, 2-3 (1945) (*House Report*). The former provided that the League of Nations "cannot, in principle, according to the rules of international law, be sued before the Swiss Courts without its express consent." Headquarters Agreement, League of Nations Official Journal 1422, art. I (1926). And the British legislation likewise provides international organizations with "[i]mmunity from suit

and legal process." 7 & 8 Geo. 6, C.44; Nov. 17, 1944, Sched. Part. I.1, *reprinted in* 39 Am. J. Int'l L. Supp. 163, 167 (1945). As Congress explained, "[b]oth of these constitute important precedents for the legislation now before us and the British legislation is substantially similar in conception and content to the legislation under consideration." *House Report* 3; *Senate Report* 3.[14]

d. Ignoring the overwhelming weight of the historical evidence, petitioners point to a single snippet of legislative history: an earlier version of the IOIA that would have provided "immunity from suit and every form of judicial process." Br. 36-37 (quoting H.R. 4489, 79th Cong. § 2(b) (1945)). But that unenacted version does not suggest that Congress rejected a rule of absolute immunity. The bill's House sponsor did not include the amendment adopting the ultimately enacted language as one of the "substantive" amendments meriting discussion on the House floor. 91 Cong. Rec. 12,532 (Dec. 21, 1945). Congress evidently did not view the earlier conferral of absolute "immunity from suit" as materially different from the enacted language. And in any event, "mute intermediate legislative maneuvers are not reliable indicators of congressional intent."[15] *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) (internal quotation marks omitted).

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[14] The State Department observed that the IOIA granted "less extensive privileges" than the British legislation. That legislation, unlike the IOIA, conferred diplomatic immunity on organizational officials. *1945 Foreign Relations* 1559-1560.

[15] Petitioners contend that Congress has subsequently "noted its understanding that the IOIA tracked" changes in foreign state immunity law. Pet. Br. 35 n.6 (citing H.R. Rep. No. 105-

3. Petitioners' remaining textual arguments lack merit.

Petitioners make two additional textual arguments, neither of which has merit.

a. Petitioners first (Br. 27) contrast Section 288a(b) to other IOIA provisions that expressly set forth substantive rules of immunity. Petitioners infer from the language of these provisions that Congress did not intend to adopt a fixed substantive rule in Section 288a(b). But that inference is unwarranted. Congress set forth specific substantive immunities when it intended to confer on organizations fewer than all of the diplomatic privileges and immunities foreign governments enjoyed under the common law. In these situations, Congress could not simply adopt the common-law standards applicable to foreign states, as it did in Section 288a(b).

For example, Section 288a(c) provides that international organization property is "immune from search," and that their "archives shall be inviolable." 22 U.S.C. § 288a(c). These are among the privileges traditionally afforded the diplomatic missions of foreign states, but they represent less than the full slate of such privileges. See, e.g., *Frend v. United States*, 100 F.2d 691, 693 (D.C. Cir. 1938); Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 Am. J. Int'l L. 828, 838 (1947). Similarly, Section 288b's exemption of organizational officials from customs and importation

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802, at 13 (1998)). But other congressional statements point in the opposite direction. See 136 Cong. Rec. S7602 (June 7, 1990) (opining that "international organizations retain absolute immunity" under the IOIA).

taxes is narrower than the "considerably broader" "exemption enjoyed by diplomatic officials." *Senate Report* 3; accord 22 U.S.C. § 288c. Finally, Section 288d(b) grants organizational officials immunity for acts "in their official capacity and falling within their functions"—but not the across-the-board immunity that diplomats have. *Senate Report* 3.

To achieve its purposes, Congress could not simply have conferred the "same immunity" that foreign states enjoyed under the common law. Indeed, the provisions described above are designed to be read together with Section 288e(c), which provides that "[n]o person shall . . . be considered as receiving diplomatic status or as receiving any of the privileges incident thereto other than such as are specifically set forth herein." 22 U.S.C. § 288e(c). Section 288a(b) did not raise the same concern: Congress intended to confer virtually absolute immunity for the reasons discussed above, and adopting the common-law rule applicable to foreign states accomplished that purpose.

b. Petitioners are also wrong to analogize Section 288a(b) to Section 288d(a), which provides that international organizations' officials "shall, insofar as concerns laws regulating entry into and departure from the United States, alien registration and fingerprinting, and the registration of foreign agents, be entitled to the same" privileges and immunities "as are accorded under similar circumstances to" certain foreign-state officials. 22 U.S.C. 288d(a); see also 22 U.S.C. § 288a(d) (using a similar formulation with respect to customs duties).

To be sure, Section 288d(a), in referring to "the same privileges, exemptions, and immunities" as for-

eign states, uses language like that contained in Section 288a(b). But the two provisions address different types of privileges and employ different surrounding language. Section 288d(a) does not address immunities enjoyed by foreign states under the common law; instead, it addresses exemptions from *statutory* requirements and duties that are granted to foreign states by "laws regulating" specified subjects. 22 U.S.C. § 288d(a).

Accordingly, both Congress and the Executive have construed Section 288d(a) (and the similarly worded Section 288a(d)) as a direction to extend to international organizations any regulatory exemption accorded to foreign states and officials. See 28 C.F.R. § 5.303 (exempting organizational officials from foreign-agent registration requirements); IOIA, 59 Stat. 669, 672, § 7(c)-(d) (1945) (exempting organizational officials from statutory limitations on entry); 19 C.F.R. §§ 148.81, .87, .89 (duties and taxes on baggage and effects); 19 C.F.R. § 145.2 (official communications by mail). Thus, international organizations were exempted from all of the enumerated requirements after the IOIA's enactment, and they remain exempt today.

C. The Foreign Sovereign Immunities Act Confirms That International Organizational Immunity Is Not Subject To Later Alterations In Foreign-State Immunity.

In 1976, Congress enacted the FSIA to "codify the restrictive theory of sovereign immunity, and . . . to transfer primary responsibility for deciding 'claims of foreign states to immunity' from the State Department to the courts." *Samantar*, 560 U.S. at 313 (quoting 28 U.S.C. § 1602); see 28 U.S.C. §§ 1604-1605, 1607. The

FSIA's text and structure confirm that it does not change the IOIA's substantive rule of virtually absolute immunity. In key respects, the FSIA cannot sensibly be applied to international organizations. Had Congress intended that the FSIA would automatically apply to international organizations by virtue of Section 288a(b), it surely would have written the statute differently to avoid these anomalies.

1. a. The FSIA made sweeping changes to the scope of foreign-state immunity even beyond those made by courts as a result of the Tate Letter. In particular, the FSIA abrogated the absolute immunity from attachment and execution previously accorded to foreign-state property. See 28 U.S.C. § 1610(a). Thus, even if Congress thought that the Tate Letter had narrowed the immunity of international organizations, the FSIA would have restricted organizational immunity still further—and in a particularly devastating manner. Without immunity from execution, organizational funds—which represent the financial contributions of the United States and other member states—would be vulnerable to attachment and execution by the courts of the member states.

Abrogating immunity from attachment and execution therefore would have threatened the ability of international organizations to use their funds for their intended purposes. Such a severe impingement on their functions could also have caused friction with other member states whose contributions would now be at risk of attachment. One would expect Congress to have given some textual indication that it intended such a sea change. But the opposite is true.

By its terms, the FSIA applies only to "foreign states," a term that includes states themselves and their agencies and instrumentalities (e.g., governmental organs and political subdivisions). 28 U.S.C. § 1603. That term does not include international organizations, which are not sovereigns. As this Court has previously held, the definition of "foreign state" limits the FSIA's application; thus, because "foreign state" does not include foreign-state officials, the FSIA does not implicitly alter their pre-existing immunity. See *Samantar*, 560 U.S. at 320-325. So too with international organizations; Congress did not silently narrow their immunity.

b. Indeed, the FSIA's sole textual reference to international organizations demonstrates that Congress did not alter their immunity. Section 1610 makes foreign-state property subject to attachment and execution in enumerated circumstances. Section 1611(a) states that "notwithstanding" Section 1610, "the property of . . . [international] organizations shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States." 28 U.S.C. § 1611(a). This provision reflects Congress's recognition that because property owned by foreign states may often be held by international organizations, judgment creditors of foreign states might seek to satisfy judgments by instituting garnishment proceedings against international organizations. Section 1611(a) therefore prohibits execution against foreign-state property held by organizations, even though Section 1610 would otherwise allow execution against that property.

The House Report confirms that neither the FSIA generally nor Section 1611(a) specifically altered the immunity conferred by the IOIA: "The reference to 'international organizations' in this subsection is not intended to restrict any immunity accorded to such international organizations under any other law or international agreement." H.R. Rep. No. 94-1487, at 31 (1976). As the United States has opined: "Congress did not want the FSIA to conflict with the immunity accorded to such organizations under pre-existing law, which might occur were their property rendered attachable under the FSIA upon being designated for payment to a foreign state." U.S. Amicus Br. 18, *EM Ltd. v. Argentina*, 473 F.3d 463 (2d Cir. Apr. 5, 2006) (No. 06-0403-cv) (U.S. *EM* Br.).

2. Other provisions of the FSIA underscore how poor a fit the FSIA is for international organizations. For one thing, it is unclear *which* of the FSIA's rules would apply. The FSIA defines "foreign states" to include both the state itself, and its agencies and instrumentalities, 28 U.S.C. § 1603, and sets forth different immunity rules for the two types of entities. 28 U.S.C. § 1610; see also 28 U.S.C. §§ 1605(a), 1606. Given that the statute does not include international organizations in those definitions, it provides no guidance as to whether international organizations should be treated as foreign states, or agencies or instrumentalities. Had Congress thought the FSIA would govern international organization immunity, it would certainly have specified which set of rules would apply. See *Samantar*, 560 U.S. at 319 (declining to extend FSIA to officials in light of FSIA's failure to explain whether rules for foreign states or instrumentalities would apply).

In addition, subjecting international organizations to suit under the FSIA would be difficult to reconcile with the IOIA's provision that organizational archives are "inviolable" and therefore immune from all discovery. 22 U.S.C. § 288a(c). Foreign states themselves (as opposed to their diplomatic missions) were not generally immune from discovery once a court had jurisdiction over the suit. *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 177 (2d Cir. 1998). The FSIA was drafted against that backdrop and does not displace civil rules governing discovery. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014). So petitioners' reading leads to the anomalous result that a civil action can proceed against an international organization but plaintiffs cannot obtain any discovery from the organization—even though such discovery would be available had the suit been brought against a foreign state. That anomaly disappears if Section 288a(b) establishes a fixed rule of virtually absolute immunity. See *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100 (1991) (Scalia, J.).

II. EXECUTIVE BRANCH PRACTICE DEMONSTRATES THAT SECTION 288a ESTABLISHED A FIXED RULE OF VIRTUALLY ABSOLUTE IMMUNITY.

Executive Branch treatment of international organizations in the years following the IOIA's enactment cannot be reconciled with interpretation of Section 288a(b) that petitioners and the government advance. They now assert that international organizational immunity shrank drastically in 1952 by virtue of the Tate Letter, and again when the FSIA abrogated foreign states' immunity from execution. If that is correct, the

United States would have been in violation of its treaty obligations—or at least out of step with the international consensus on the necessary scope of immunity—with respect to several organizations that depended on the IOIA for their immunity. Yet there is absolutely no indication that the United States or the affected organizations viewed matters that way. To the contrary, the Executive repeatedly took actions that are consistent only with the assumption that the IOIA continued to provide virtually absolute immunity even after 1952.

1. The Executive Branch has repeatedly taken actions inconsistent the position it now espouses.

a. The Executive's treatment of the United Nations makes clear that the Executive interpreted the IOIA as providing virtually absolute immunity even after 1952. Article 105 of the U.N. Charter, which was not self-executing, committed the United States to provide the U.N. with immunities "necessary for the fulfillment of its purposes." U.N. Charter art. 105, ¶ 1. In 1946, the U.N. member states negotiated the United Nations Convention on Privileges and Immunities (Convention) to implement Article 105. 1 *Foreign Relations of the United States, 1947, General: The United Nations*, The Secretary of State to the Speaker of the House of Representatives 32 (Washington: Government Printing Office, 1973) (*1947 Foreign Relations*). The Convention provides that the U.N. should enjoy absolute immunity from suit, thereby confirming that absolute immunity was a "necessary" immunity under Article 105 of the U.N. Charter. See United Nations Convention on Privileges and Immunities, art. II, § 2; *id.* art. IV, §§ 11-16.

Until the United States ratified the Convention in 1970, the IOIA was the U.N.'s only source of immunity

under U.S. law (together with a headquarters agreement providing for immunity of the U.N.'s premises). See *1947 Foreign Relations*, Doc. 19 at 32, 35; Exec. Order No. 9698 (Feb. 19, 1946). Under petitioners' view, however, the scope of the U.N.'s immunity under the IOIA would have contracted to restrictive immunity in 1952. At the very least, that would have been in significant tension with the United States' commitment in the U.N. Charter to provide the U.N. with the "necessary" immunities.

Moreover, during this entire period, the Executive gave no indication that it believed the United States was according the U.N. anything less than virtually absolute immunity under the IOIA. To the contrary, in urging Congress to authorize accession to the Convention both before and after 1952, the State Department characterized the Convention as broader than the IOIA only in "minor" respects pertaining to the immunity of *officials*, not the U.N. itself. 33 *Foreign Relations of the United States, 1964-1968, Organization and Management of Foreign Policy*, The Representative to the United Nations to President Johnson, Doc. 423 at 915 (Washington: Government Printing Office, 2004); *1947 Foreign Relations*, Doc. 19 at 32; Richard Nixon, Message to the Senate Transmitting Convention on the Privileges and Immunities of the United Nations, 1969 Pub. Papers 1037 (1969). The Executive never once suggested that acceding to the Convention would bring about a substantial change in the organizational immunity afforded the U.N. under the IOIA. Had the Executive Branch believed that the Tate Letter substantially narrowed the U.N.'s immunity in 1952, accession would have been a far more urgent matter, as it would have involved far more than a "minor exten-

sion" of diplomatic immunity. Accession would have been necessary to restore to the U.N. the organizational immunity promised in its charter.

b. Similarly, under petitioners' construction of the IOIA, the Tate Letter would have sharply reduced the immunity of several international organizations within the U.N. system, to which the United States had committed to provide the immunity "necessary" for their functions. See, e.g., Constitution of the United Nations Educational, Scientific and Cultural Organisation art. XII, Nov. 16, 1945, 4 U.N.T.S. 275; International Labour Organization, Constitution art. 40 (1919); Food and Agriculture Organization, Constitution art. XVI (1945). Because these agreements were non-self-executing, *ibid.*; see *Bond v. United States*, 134 S. Ct. 2077, 2084 (2014), these organizations' domestic immunity arose solely from the IOIA. Exec. Order 9863 (May 31, 1947); Exec. Order 9698 (Feb. 19, 1946). In 1947, the member states of these organizations concluded in the U.N. Convention on the Privileges and Immunities of the Specialized Agencies that these organizations should receive absolute immunity. The United States did not join that convention, instead leaving the IOIA as the only domestic source of immunity. It is difficult to imagine that, just seven years after these organizations were accorded virtually absolute immunity in the IOIA, the withdrawal of that immunity would have gone unremarked on by both the Executive Branch and the organizations themselves.

c. This trend continued after the FSIA's enactment. In 1977, the United States designated the International Centre for Settlement of Investment Disputes (ICSID) as an international organization under the IOIA. The treaty establishing the ICSID provided for abso-

lute immunity. Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 20, Oct. 14, 1966, 17 U.S.T. 1270. The ICSID convention is not self-executing, *Medellin v. Texas*, 552 U.S. 491, 521 (2008), and its immunity provisions have not been legislatively implemented. But the Executive Order designating ICSID under the IOIA states only that ICSID "is hereby designated as a public international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the [IOIA]." Exec. Order No. 11,966 (Jan. 24, 1977). If, as petitioners claim, the IOIA conferred only restrictive immunity in 1977, the United States would have immediately been in violation of its treaty obligations.

2. a. These examples disprove the government's assertion (Br. 26-27) that it has understood the IOIA to confer only restrictive immunity after the Tate Letter in 1952. The government now contends that whenever an organization has required absolute immunity, the United States has entered into a self-executing treaty or enacted implementing legislation providing for such immunity. But, as shown, that is simply not so. That the United States has *sometimes* entered into self-executing treaties providing for absolute immunity does not suggest any view of the IOIA. Such treaties reflect agreement among all member states of the organization, and they govern the organizations' rights in the territories of all member states. Consequently, such treaties cannot support an inference that the United States—let alone other member states—drafted

them with a particular interpretation of the IOIA in mind.[16]

Much more salient is the fact that numerous organizations have relied on the IOIA to provide them with the immunity that the United States committed to afford them in a non-self-executing treaty. As a result, the necessary consequence of the government's own interpretation of the IOIA is that the United States has been in violation of multiple commitments made through non-self-executing treaties.

b. The Executive actions described above cannot be squared with the government's current position that the IOIA incorporates the changing law of foreign-state immunity. In like manner, the government's position as expressed in litigation has swung from pillar to post. In 1980, the government asserted in the D.C. Circuit that international organizations had only restrictive immunity under the FSIA. See *Broadbent v. Organization of American States*, 628 F.2d 27, 31 (1980); U.S. Br. 28.[17] After the D.C. Circuit rejected that view in

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[16] The government is also wrong (Br. 26) that organization-specific statutes granting absolute immunity would be superfluous if the IOIA already did so. Such statutes typically address a range of immunities, some of which are beyond the IOIA's scope, and some of which incorporate an organization's waivers of immunity into domestic law. E.g., 22 U.S.C. § 290g-7. In addition, such statutes obviate questions concerning whether the relevant treaty is self-executing.

[17] The government argues that it contemporaneously characterized a 1992 headquarters agreement providing the Organization of American States (OAS) with absolute immunity as going "beyond the usual United States practice of affording restrictive immunity." Br. 27-28 (citing S. Treaty Doc. No. 40, 102d Cong., 2d Sess. VI (1992)). But that mention of "restrictive immunity"

Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335 (1998), however, the Executive Branch did not use its authority under Section 288 of the IOIA to clarify through executive order that any international organization enjoyed only restrictive immunity. Nor did the government urge the D.C. Circuit to reconsider its view.

To the contrary, in its most recent expression of a position on Section 288a(b), the United States informed the Second Circuit in 2007 that it "provides for absolute immunity of covered organizations." U.S. *EM* Br. 17 & n.*. The United States has now repudiated that position (Br. 29 n.8). But the fact that it has done so—along with the history of Executive practice described above—provides ample reason to afford the government's current views no deference. See *Carcieri v. Salazar*, 555 U.S. 379, 390 (2009).

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in the treaty context more likely referred to other treaties that deny organizations immunity for certain commercial activities. Indeed, the OAS agreement itself undermines the government's current position, as it states that in commercial cases submitted to arbitration, the arbitrator may not "issue an order that a court . . . would be precluded by the IOIA from issuing with respect to the property" of OAS. S. Treaty Doc. No. 40, at 6. That provision assumes that the IOIA precludes execution against organizational property even in commercial cases. But if Section 288a(b) required that the immunity of organizational property follow that of foreign states, execution would be permitted under the FSIA. 28 U.S.C. § 1610.

III. SUBJECTING INTERNATIONAL ORGANIZATIONS TO RESTRICTIVE IMMUNITY WOULD THREATEN THEIR ABILITY TO CARRY OUT THEIR MISSIONS.

A. Applying The Restrictive Theory Of Sovereign Immunity To International Organizations Would Defeat The Purposes For Which These Organizations Receive Immunity.

IFC and many other international organizations headquartered or operating in the United States have long relied on the certainty and predictability conferred by the IOIA's rule of virtually absolute immunity. See *Atkinson*, 156 F.3d at 1340. Construing the IOIA now to subject international organizations to the restrictive theory of sovereign immunity would disrupt that settled understanding and defeat the purposes for which these organizations were granted immunity.

1. At its core, the restrictive theory rests on a distinction between a foreign state's "sovereign" acts and its "private" or "commercial" ones. See pp. 23-24, *supra*. But that distinction has no purchase in the context of international organizations. *International Institutional Law* § 1610. These organizations are not sovereigns. Nor are they commercial actors. To be sure, IFC and other multilateral development banks routinely make use of the tools of commerce, such as providing financing and issuing securities. But they do so to advance their decidedly non-commercial missions of promoting international development, peace and stability.

Any suit that challenges the way an international organization pursues its objectives will necessarily implicate the underlying purposes of its immunity. That is because any such suit threatens to empower national courts (in particular, those of the host nation) to second-guess the organization's core policy judgments, and to burden its funds, including those contributed by member states. Applying the FSIA's foreign-sovereign-immunity exceptions to international organizations would therefore create a risk that U.S. courts will apply domestic-law principles to declare unlawful actions that the member states have collectively decided are necessary to carry out these organizations' missions—in direct contravention of the animating purpose of organizational immunity. See Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 Va. J. Int'l L. 53, 63 (1995) ("[T]he imperii/gestionis distinction is inadequate to deal with these cases.").

For that reason, there is a strong international consensus that subjecting international organizations like IFC to suit for so-called commercial activities would be inconsistent with the purposes of their immunity. See, e.g., *International Institutional Law* § 1610, at 1033 ("[T]he application of the distinction between acta iure gestionis and acta iure imperii to acts of international organizations has been explicitly rejected by courts of other countries, and is also generally rejected in doctrine.") (citing cases); *Firma Baumeister Ing. Richard L v. O.*, judgment of 14 December 2004, File No. 100b53/04y, at 394, 397 (Austrian Supreme Court) ("While, under national law and prevailing international law, foreign states enjoy immunity only in respect of sovereign acts, but not in their capacity of legal

entities in private law, the immunity of international organizations must, [as] a matter of principle, be regarded as absolute when they are acting within the limits of their functions"). [18]

2. That rule is not at all anomalous. See Pet. Br. 33. Petitioners make much of the point that an organization would be immune for a commercial activity when the organization's member states would not have immunity for the "same" activity. But the activities are not the same. A foreign state that engages in commercial activities is not pursuing sovereign activities warranting immunity. By contrast, multilateral development banks' activities are commercial only in the sense that they employ tools of commerce to achieve the broader cooperative objectives for which its member states created it. The whole point of granting them immunity is to protect their ability to pursue these objectives.

The United States attempts (Br. 32) to sidestep the threat its position poses to the established purposes of organizational immunity, arguing that if member states believed that an organization's mission required a particular level of immunity, those states could have specified as much in the organization's governing charter. That misses the point. In enacting the IOIA, Congress would not have tied international organizational

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[18] See also *Stichting Mothers of Srebrenica v. United Nations*, ¶ 4.2, Case No. 10/04437, 13 April 2012, Hoge Raad, ILDC 1760 (NL 2012); *Investment & Finance Company of 11 January 1984 Limited v. UNICEF*, No. U 2000 478 Ø, ILDC 64 (DK 1999) (comment A2); *Consortium X v. Switzerland*, Final appeal judgment, BGE 130 I 312, ILDC 344 (CH 2004), 2nd July 2004, Switzerland.

immunity to developments in foreign-state immunity in the first place because it understood that the two immunities are conferred for different reasons. And a suggestion of this kind by the government is cold comfort to the international organizations whose charters were negotiated against the backdrop of the virtually absolute immunity that they assumed the IOIA provided.

B. Subjecting IFC And Other International Organizations To Suit Under The FSIA Will Impede Their Ability To Perform Their Missions.

IFC and other multilateral development banks finance projects in the most challenging parts of the world—projects that consequently are particularly likely to give rise to litigation. The United States has historically viewed the work of these organizations as critical to U.S. national-security interests precisely because they operate in "fragile and conflict-affected states" in order to provide "assistance that addresses the root causes of instability" and "respond[s] to global crises." U.S. Dep't of the Treasury, *Report to Congress from the Chairman of the National Advisory Council on International Monetary and Financial Policies* 9-10 (2017). Subjecting these organizations to suits like petitioners' based on international development lending activities risks hobbling their ability to carry out their core functions.

IFC provides a particularly stark example of the threat. IFC has recently financed projects in Yemen, Chad, Afghanistan, and Iraq, to name just a few of the several hundred projects in which IFC is currently in-

volved.[19] As these investments illustrate, IFC has long viewed a key part of its mission to be fostering peace and stability by alleviating poverty and improving the lives of individuals in challenging environments, even when the lack of local stability increases the associated risks. Those aspects of IFC's mission directly further U.S. national-security and foreign-relations interests. At the same time, IFC's willingness to intervene in such challenging environments increases the risks of suits like petitioners'.

Indeed, petitioners' claims, and those like them, would pose a particularly acute threat to IFC's ability to function effectively. Perversely, petitioners base their claims for damages on IFC's efforts to use its financing activities to promote sustainable development in countries whose laws impose no comparably rigorous requirements. IFC seeks to encourage sustainable development by requiring funding recipients to adhere to IFC's own voluntary sustainability standards. These sustainability goals are also important to the United States. The Treasury Department, in the exercise of its leadership role within each development bank, "promotes universal access to affordable, reliable, sustainable and clean energy," and fosters public sustainability standards. U.S. Dep't of the Treasury, *Guidance for U.S. Positions on Multilateral Development Banks Engaging on Energy Projects and Policies*; U.S. Dep't of the Treasury, *Resource Center: Multilateral Development Banks*.[20] Yet under petitioner's ap-

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[19] https://disclosures.ifc.org/#/projectMapping.

[20] https://www.treasury.gov/resource-center/international/development-banks/Pages/index.aspx.

proach, it is IFC's very effort to go beyond local law to promote these objectives that subjects IFC to potential liability.

If petitioners prevail, IFC and other multilateral development banks will not merely be subject to suits like this one alleging that the organization's contractual rights render it liable in tort when financed projects fall short of meeting sustainability objectives. It is easy to imagine the myriad lawsuits to which international organizations could be subjected: suits challenging an alleged failure to enforce self-imposed labor or environmental standards; suits challenging the decision to invest in a particular country in the first place; and even suits seeking to hold an organization responsible for a host government's illegal conduct. Cf. *Kiobel*, 569 U.S. at 113.

Moreover, foreign nationals will be likely to target international organizations as defendants. Here, for instance, petitioners could not have sued the Indian corporations that allegedly caused their injuries: the lack of any nexus to the United States would have rendered the ATS unavailable and raised significant jurisdictional and procedural barriers. See *Jesner*, 138 S. Ct. at 1398, 1405. So petitioners are attempting to achieve the same result by a different route: suing IFC because it partially financed the project and is the only lender headquartered in the United States. Indeed, international organizations will offer prospective plaintiffs an attractive slate of characteristics: self-imposed, high environmental and social standards, deep pockets, and a jurisdictional hook to get their claims before a United States court—notwithstanding the United States' tenuous connection to the underlying events. If petitioners prevail, suits attempting to hold interna-

tional organizations liable for a wide range of alleged foreign injuries will proliferate. By adjudicating conduct within the jurisdiction of a foreign sovereign, such suits will raise the same policy and foreign relations concerns as the similarly foreign-focused, sweeping ATS lawsuits that proliferated after the Second Circuit permitted them in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). See *Jesner*, 138 S. Ct. at 1406.

Even one such suit could enmesh an international organization in difficult litigation, alter its judgments about the projects it can reasonably fund and, if successful, drain billions of dollars earmarked for development projects. And such chilling effects, bad as they are, would not be the only problem. United States courts would sit in judgment over the collective policy decisions made by the member states of international organizations headquartered here. In this very case, a factfinder would second-guess IFC's institutional policy decisions, including the balance its member states have struck between sustainability and development, and its conclusions about the policies best suited to the organization and its projects. That is precisely the inappropriate interference that the Executive Branch, working together with other member states, sought to forestall when the Executive first recognized that international organizations must have immunity to protect them from suit in national courts. See pp. 21-22, *supra*.

Faced with those financial and policy consequences, multilateral development banks would have no choice but to reevaluate their operations and policies. IFC, for instance, would be forced to consider altering or even abandoning its sustainability standards, and to turn down viable projects to avoid the risk of litigation.

These changes would undermine a range of the United States' priorities with respect to development institutions, including fostering sustainability and accountability. And second-guessing by U.S. courts threatens to create severe tensions among member states, undermining IFC's ability to function as a collective institution.

Ultimately, "the prospect of costly litigation [based on investment in foreign countries] may hinder global investment in developing economies, where it is most needed, and inhibit efforts by the international community to encourage positive changes in developing countries." U.S. Amicus Br. 20, *American Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (S. Ct. 2007) (citation and internal quotation marks omitted). That concern is particularly acute in the context of the very international organizations that the United States established after World War II to promote peace, stability and development throughout the world.

C. Other Legal Doctrines Cannot Be Counted On To Eliminate These Risks To The Missions Of International Organizations.

Whereas petitioners believe that the very point of the IOIA and the FSIA is to subject the operation of international organizations to oversight by U.S. courts, the government suggests that such consequences are unlikely to materialize in practice. But the government misapprehends the risks.

Under the FSIA, foreign states are subject to suits "based upon a commercial activity carried on in the United States," or upon commercial activities performed elsewhere that have a defined nexus to the United States. 28 U.S.C. § 1605(a)(2). The FSIA fur-

ther provides that the "commercial character of an activity shall be determined by reference to the nature of the . . . particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603. An activity is commercial if it is the sort of transaction that private parties can undertake, rather than something only sovereigns can do. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614-615 (1992).

IFC and other development banks will vigorously argue that particular activities are not commercial within the meaning of the FSIA. But the FSIA's sovereign/commercial dichotomy does not map onto international organizations. They are not sovereign bodies, they are separate juridical persons, and they cannot take sovereign acts. And the fact remains that these organizations employ traditional financial tools in service of their overarching non-commercial objectives. If courts focus on the financial tools employed, they may conclude that those activities are commercial—a conclusion that would eviscerate immunity for IFC's core functions.

Notably, the government avoids stating that multilateral development banks' core activities will not be considered "commercial" for purposes of the FSIA. Instead it points to several second-order FSIA defenses. In particular, the government notes (Br. 33) that Section 1605(a)(2) requires that the commercial activity occur "in the United States." But many organizations are headquartered in the United States, execute transactions here, and denominate those transactions in U.S. dollars. While international organizations will certainly contend that suits like the present one cannot proceed under Section 1605(a)(2), the government can provide no assurance that courts will agree.

The government also points to the requirement that a suit be "based upon" the relevant commercial activity. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015). This requirement bars suits whose gravamen is disconnected from the underlying commercial activity. But as discussed, see p. 10, *supra*, IFC's financing agreements include standards designed to achieve salutary policy objectives that it views as important to the projects. It is those very standards that petitioners seek to turn against IFC by alleging that their suit is "based upon" a commercial activity in the United States. They will no doubt argue that their claims are based upon commercial activity because IFC included the standards in its lending agreements and allegedly failed to enforce them.[21]

It is true that some multilateral development banks' governing treaties, including IFC's, narrowly carve out certain suits by direct commercial counterparties from their immunity, because doing so is necessary to their ability to raise private capital. See pp. 9-10, *supra*. That reflects the member states' considered judgment that permitting such suits (but not others) furthers the individual institution's functions by facilitating certain transactional activities. But those exceptions are far narrower than potential applications of the FSIA's commercial activities exception. Because that exception merely requires that the claims be "based upon" commercial activities, court could construe it to permit

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[21] The government's suggestion (Br. 33) that IFC can simply rewrite its lending agreements to exclude purported third-party beneficiary claims overlooks that this is primarily a *tort* suit.

a wide range of tort claims arising out of development activities.[22]

* * *

The best reading of the IOIA's text, considered in light of the statutory structure and the purposes for which it was enacted, mandates that international organizations continue to receive the same virtually absolute immunity that Congress prescribed when it enacted the statute in 1945. Abandoning that longstanding interpretation in favor of the restrictive immunity petitioners seek would defeat the fundamental purpose of organizational immunity by impeding international organizations' ability to pursue their development objectives. It would also open U.S. courts to a flood of foreign-focused lawsuits that would require U.S. courts to second-guess international organizations' core policy judgments, and that have only the most tenuous connection to the United States.

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[22] The FSIA's application is "[s]ubject to existing international agreements to which the United States is a party at the time of [its] enactment." 28 U.S.C. § 1604. IFC argued below that its Articles provide it with immunity from this suit even if the IOIA does not. C.A. Br. 16, 34-35. Because the question presented concerns only IFC's immunity under the IOIA, the scope of immunity under the Articles is not before this Court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, ET AL.,
Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

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TABLE OF CONTENTS

Page

I. STATUTORY CONSTRUCTION PRINCIPLES DICTATE THAT THE IOIA'S "SAME IMMUNITY" PROVISION TRACKS THE FSIA 2

A. The IOIA Tracks Current Foreign Sovereign Immunity Law. 2

1. Text 2

2. Structure 8

3. Legislative History 12

B. Even if the IOIA Locked in Foreign Sovereign Immunity Law as of 1945, That Would Still Require Applying the FSIA Today 14

II. THE GOVERNMENT'S PAST AND CURRENT POSITIONS CONFIRM THAT THE "SAME IMMUNITY" PROVISION TRACKS THE FSIA 15

III. THE IFC'S POLICY ARGUMENTS ARE UNAVAILING. 21

CONCLUSION 25

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Adamson v. Bowen,
855 F.2d 668 (10th Cir. 1988) 6

American Steamboat Co. v. Chase,
83 U.S. 522 (1872) 4

Blatchford v. Native Vill. of Noatak & Circle Vill.,
501 U.S. 775 (1991) 9

Bond v. United States,
134 S. Ct. 2077 (2014) 18

Brzak v. United Nations,
597 F.3d 107 (2d Cir. 2010) 8

Burrage v. United States,
571 U.S. 204 (2014) 21

Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc.,
137 S. Ct. 2042 (2017) 23

Do Rosário Veiga v. World Meteorological Org.,
486 F. Supp. 2d 297 (S.D.N.Y. 2007) 13

El Encanto, Inc. v. Hatch Chile Co.,
825 F.3d 1161 (10th Cir. 2016) 5

FAO v. INPDAI,
87 ILR 1 (Court of Cassation 1982) 22

FTC v. Groiler, Inc.,
462 U.S. 19 (1983) 3, 4

J. McIntyre Mach., Ltd. v. Nicastro,
564 U.S. 873 (2011) 24

TABLE OF AUTHORITIES
(continued)

Page(s)

James Stewart & Co. v. Sadrakula,
309 U.S. 94 (1940) 6

Liberian E. Timber Corp. v. Republic of Liberia,
659 F. Supp. 606 (D.D.C. 1987) 10

McNeill v. United States,
563 U.S. 816 (2011) 7

Medellin v. Texas,
552 U.S. 491 (2008) 18

Miles v. Apex Marine Corp.,
498 U.S. 19 (1990) 3

Moragne v. States Marine Lines, Inc.,
398 U.S. 375 (1970) 3

Morissette v. United States,
342 U.S. 246 (1952) 4

OBB Personenverkehr AG v. Sachs,
136 S. Ct. 390 (2015) 23

Oliver Res. PLC v. IFC,
62 F.3d 128 (5th Cir. 1995) 24

Osseiran v. IFC,
552 F.3d 836 (D.C. Cir. 2009) 23

Pott v. Arthur,
104 U.S. 735 (1881) 11

Ratzlaf v. United States,
510 U.S. 135 (1994) 12

Republic of Argentina v. Weltover, Inc.,
504 U.S. 607 (1992) 25

TABLE OF AUTHORITIES
(continued)

Page(s)

Republic of Mexico v. Hoffman,
324 U.S. 30 (1945) 15

Sabbath v. United States,
391 U.S. 585 (1968) 4

Taiwan v. U.S. Dist. Ct.,
128 F.3d 712 (9th Cir. 1997) 9

Trammel v. United States,
445 U.S. 40 (1980) 3

United States v. Dire,
680 F.3d 446 (4th Cir. 2012) 6

Vasina v. Grumman Corp.,
644 F.2d 112 (2d Cir. 1981) 6

Warren v. United States,
340 U.S. 523 (1951) 18

Statutes

1 Stat. 73, § 9 (1789) 4

5 U.S.C. § 552(b)(5) 3

5 U.S.C. § 7342(a)(2)(A) 12

15 U.S.C. § 78m(q)(1)(B) 11

16 U.S.C. § 457 6

18 U.S.C. § 1651 6

18 U.S.C. § 3109 4

22 U.S.C. § 283g 20

22 U.S.C. § 283hh 20

TABLE OF AUTHORITIES
(continued)

	Page(s)
22 U.S.C. § 286h	8, 20
22 U.S.C. § 288a(a)(iii)	10
22 U.S.C. § 288a(b)	7, 11, 12
22 U.S.C. § 288f-2	21
22 U.S.C. § 290i-8	20
22 U.S.C. § 290k-10	20
22 U.S.C. § 611(e)	12
22 U.S.C. § 1650	19
22 U.S.C. § 1650a	19
28 U.S.C. § 1333	4
28 U.S.C. § 1603	11, 23
28 U.S.C. § 1603(a)	12
28 U.S.C. § 1605(a)(2)	12, 23
28 U.S.C. § 1605(g)	10
28 U.S.C. § 1610	10
28 U.S.C. § 1611	10
28 U.S.C. § 2412(b)	5
28 U.S.C. § 5001	6
50 U.S.C. § 4565(a)(4)	12
Pub. L. No. 101-513, 104 Stat. 1979 (Nov. 5, 1990)	20
Pub. L. No. 89-369, 80 Stat. 72, § 9 (Mar. 16, 1966)	20

TABLE OF AUTHORITIES
(continued)

Page(s)

Pub. L. No. 89-532, 80 Stat. 344 (Aug. 11, 1966) 19

Rule

Fed. R. Evid. 501 3

Executive Material

Exec. Order No. 11966, 42 Fed. Reg. 4331 (Jan. 19, 1977) 19

Other Authorities

Agreement Establishing the International Fund for Agricultural Development, art. 10, § 2(a) (June 13, 1976) 20

Black's Law Dictionary (10th ed. 2014) 11

Boon, Kristen E., *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 Chi. J. Int'l L. 341 (2016) 17

Choudhury, Farhana, *The United Nations Immunity Regime: Seeking a Balance Between Unfettered Protection and Accountability*, 104 Geo. L.J. 725 (2016) 17

Constitutionality of the Bretton Woods Agreement Act (1945) 14

Convention between the United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (Mar. 2, 1953) 20

TABLE OF AUTHORITIES
(continued)

Page(s)

Convention on Great Lakes Fisheries (Sept. 10, 1954) 20

Convention on the Organization of Economic Co-operation and Development, Supplementary Protocol No. 2 (Dec. 14, 1990) 20

Convention on the Settlement of Investment Disputes, § 6, art. 19 (Oct. 14, 1966) 19

Gavouneli, Maria, *Greece*, in The Privileges and Immunities of International Organizations in Domestic Courts 131 (August Reinisch ed., 2013) 22

IFC Articles, art. 6, § 3 13

North Pacific Marine Science Organization Convention, art. IX(ii) (Mar. 24, 1992) 20

Pavoni, Riccardo, *Italy*, in The Privileges and Immunities of International Organizations in Domestic Courts 155 (August Reinisch ed., 2013) 22

Preuss, Lawrence, *The International Organizations Immunities Act*, 40 Am. J. Int'l L. 332 (1946) 13

Marochkin, Sergei Yu, *Russia*, in The Privileges and Immunities of International Organizations in Domestic Courts 221 (August Reinisch ed., 2013) 22

TABLE OF AUTHORITIES
(continued)

Page(s)

U.N. Charter, art. 105, § 1 17

World Health Organization Const., arts. 66-67 (July 22, 1946) 20

REPLY BRIEF FOR PETITIONERS

Faced with a statutory provision that gives international organizations the "same" immunity from suit as foreign governments, the IFC urges this Court to give it "different"—and greater—immunity than such entities. Resp. Br. 22-23. But there is no escaping the IOIA's plain text. That language makes clear that the IOIA incorporates the *current* law of foreign sovereign immunity. Any other construction would not only fly in the face of Congress's choice of words, but also would wreak havoc on long-settled understandings that other incorporations-by-reference throughout the U.S. Code likewise require applying the referenced law as it exists today.

The IFC's arguments concerning Executive Branch practice and the policy goals of international organizational immunity also lack force. Ever since the Foreign Sovereign Immunities Act (FSIA) was enacted, the Executive Branch has taken the position that the IOIA's "same immunity" provision incorporates the FSIA. The United States reaffirms that view here, and it aligns with the Government's treatment of international organizations. That view is also consistent with sensible policy. Organizations that engage in commercial transactions should be subject to the same rules as other commercial actors, including foreign sovereigns. They certainly should not be singularly above the law.

I. STATUTORY CONSTRUCTION PRINCIPLES DICTATE THAT THE IOIA'S "SAME IMMUNITY" PROVISION TRACKS THE FSIA

In the IFC's telling, Congress meant to enshrine in the IOIA "an unchanging substantive rule" of virtually absolute immunity from suit for foreign sovereigns. Resp. Br. 31. But there is no indication that Congress thought it was enacting the very rule it rejected in the drafting process, *see* Petr. Br. 36-37, or that international organizations should ever receive—as the IFC's position would dictate—*greater* immunity than foreign sovereigns themselves. Instead, well-established principles of statutory construction demonstrate that Congress chose to tie such immunity to the immunity of foreign sovereigns.

A. The IOIA Tracks Current Foreign Sovereign Immunity Law.

1. Text

The IFC does not dispute that if sovereign immunity had been governed by statutory law when the IOIA was enacted, the IOIA's "same immunity" provision would require applying sovereign immunity law as it exists today. Indeed, the IFC concedes that Section 288d of the IOIA, which governs the immunity of officers and employees, incorporates the statutory law it references on a dynamic basis. Resp. Br. 38-39. But the IFC says that the reference canon does not apply to the "same immunity" provision at issue here because sovereign immunity law was governed in 1945 by a body of common law. *Id.* 25-28.

This argument—which neither the IFC nor anyone else has ever previously advanced—is deeply flawed.

a. It makes no sense to suspend the reference canon when a statute references a body of law that, at the time of enactment, was common law. Even more than statutory law, common law is inherently evolving (and subject to displacement by later legislative enactment). *See* Petr. Br. 19; *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 388-93 (1970). Courts applying the common law, therefore, have "always" had the duty "to interweave the new legislative policies with the inherited body of common-law principles." *Id.* at 392; *see also Miles v. Apex Marine Corp.*, 498 U.S. 19, 24 (1990) ("[L]egislation has always served as an important source of . . . common law . . . principles."). Congress surely has always expected the same principle to apply to incorporations by reference.

b. The IFC's proposed distinction also runs headlong into precedent. *Trammel v. United States*, 445 U.S. 40 (1980)—a case petitioners discussed, Petr. Br. 36-37, but the IFC ignores—provides a powerful example. That case addressed Federal Rule of Evidence 501, which provides that claims of privilege are governed by "[t]he common law." Fed. R. Evid. 501. The Court explained that the provision does *not* "freeze the law of privilege," but rather "leave[s] the door open to change." *Trammel*, 445 U.S. at 47. Similarly, in *FTC v. Groiler, Inc.*, 462 U.S. 19 (1983), the Court addressed a subsection of the Freedom of Information Act that exempts materials that "would not be available by law." 5 U.S.C. § 552(b)(5). The

Court held that the provision required applying "the current state of the law" regardless of whether the incorporated law was found in common law or a statute. *Groiler*, 462 U.S. at 27; *see also id.* at 34 n.6 (Brennan, J., concurring); *Sabbath v. United States*, 391 U.S. 585, 589 (1968) (interpreting 18 U.S.C. § 3109 "to incorporate fundamental values and the ongoing development of the common law").

American Steamboat Co. v. Chase, 83 U.S. 522 (1872), is even more on point. The so-called "saving to suitors" clause of the first Judiciary Act guarantees the right to seek "a common-law remedy"—in lieu of invoking federal admiralty jurisdiction—"where the common law is competent to give it." 1 Stat. 73, § 9 (1789) (now codified at 28 U.S.C. § 1333). When the plaintiff invoked the provision to seek damages based on "a State statute enacted subsequent to the passage of the Judiciary Act," the defendant objected on the ground that "the operation of the saving clause must be limited to such causes of action as were known to the common law at the time of the passage of the Judiciary Act." *Chase*, 83 U.S. at 533. This Court rejected the argument, invoking the "familiar principle[]" that a statutory reference to the "common law" includes later-enacted state statutes. *Id.* at 534-35.

The IFC invokes a line of cases involving the rule that "where Congress borrows *terms of art*" with particularized meanings at common law, the statute adopts those common law meanings. *Morissette v. United States*, 342 U.S. 246, 263 (1952) (emphasis added), *cited in* Resp. Br. 26. But the IFC is mixing

apples and oranges. As the language just quoted indicates, the canon the IFC invokes deals with "terms of art" in federal statutes, not directives to apply other general bodies of law. Even if the former freezes in time the specific common-law that is implicitly referenced (somewhat like a reference to a specific statutory provision does), that says nothing about how to construe a statute that references a general body of law. Only the reference canon does that.

c. The IFC's proposed distinction between references to bodies of statutory law and references to common law would also wreak havoc on numerous other federal laws. For example, everyone understands the Federal Tort Claims Act (FTCA), enacted the year after the IOIA, to incorporate state tort law on an evolving basis. *See* Petr. Br. 20 (citing cases). Adjudicating cases under increasingly antiquated common law from each state would cause serious headaches and risk mismanaging modern disputes. *See El Encanto, Inc. v. Hatch Chile Co.*, 825 F.3d 1161, 1164 (10th Cir. 2016) (Gorsuch, J.).

And the FTCA would be just the beginning. Consider the following statutes:

- the Equal Access to Justice Act (EAJA), making the United States liable for fees and expenses "to the same extent that any other party would be liable under the common law or under the terms of any statute," 28 U.S.C. § 2412(b);
- the federal wrongful death statute, which provides a right of action with respect to federal enclaves "as though the place were under the

jurisdiction of the State in which the place is located," 28 U.S.C. § 5001 (formerly codified at 16 U.S.C. § 457);

- the federal piracy statute, enacted in 1819, which criminalizes piracy "as defined by the law of nations," 18 U.S.C. § 1651.

Each of these statutes references what was, at least at the time of enactment, a body of common law. And each is understood to incorporate the referenced law on an evolving basis. *See, e.g.*, *Adamson v. Bowen*, 855 F.2d 668, 672 (10th Cir. 1988) (EAJA's references to "common law" and "statutes" both account for "the shifting nature of both bodies of law and [are] intended to encompass current law and subsequent changes"); *Vasina v. Grumman Corp.*, 644 F.2d 112, 117 (2d Cir. 1981) (wrongful death); *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 100 (1940) (reference in predecessor statute "keep[s state law] current," and ensures that "future statutes of the state are . . . part of the body of laws" that are incorporated); *United States v. Dire*, 680 F.3d 446, 467-68 (4th Cir. 2012) (piracy).

Many more statutes like these populate the U.S. Code. *See generally* Amicus Br. of Bipartisan Members of Congress 16-21. Congress, in fact, frequently relies on the long-settled rule that such statutes require applying the law as it exists today, not decades or centuries ago. *See id.* This Court should not upend that rule.

d. Two other aspects of the text of Section 288a(b) confirm that the provision incorporates foreign sovereign immunity law as it exists today.

First, the "same immunity" provision uses the present tense ("as is enjoyed"), which refers to the time suit is filed. Petr. Br. 23-24. The IFC cites a single case in which this Court construed a statute's use of the present tense to refer to law at a time in the past. Resp. Br. 29 (citing *McNeill v. United States*, 563 U.S. 816, 821 (2011), involving the Armed Career Criminal Act). But the Court did so in that case to avoid "the absurd results that would [have] follow[ed] from consulting *current* state law" to understand the conduct necessarily encompassed by a *past* conviction. *McNeill*, 563 U.S. at 822 (emphasis added). Even then, the Court held that the federal statute incorporated state law at the time of the defendant's conviction, not—as the IFC proposes here—when the federal statute was enacted. *Id.* at 820. In short, a statute's use of the present tense virtually always directs courts to law and facts at the time the suit is filed, and Section 288a(b) fits this mold. *See* Petr. Br. 23-24; Amicus Br. of United States (U.S. Br.) 14-15.

Second, Congress insisted that international organizations "enjoy the *same* immunity . . . as is enjoyed by foreign governments." 22 U.S.C. § 288a(b) (emphasis added). The IFC admits that the first Civil Rights Act used materially identical "the same . . . as is enjoyed" language to express continuing equality between black and white citizens rather than static equality as of 1866. Resp. Br. 29 n.10. But the IFC says that this language should be construed differently here because the IOIA's "purpose" was supposedly not to ensure equivalent treatment between international organizations and foreign governments.

Id. This reasoning is backwards. The fact that Congress chose a verbal formulation well understood to establish ongoing equality, and applied it to foreign governments and international organizations, confirms that this was indeed Congress's purpose. *See also* Petr. Br. 21-22.

2. Structure

The IOIA expressly confers absolute immunity against actions other than lawsuits, further reinforcing that Congress intended the "same immunity" provision to be construed differently. *See* Petr. Br. 26-27. None of the IFC's responses concerning the IOIA's structure has force.

a. The IFC repeats the D.C. Circuit's contention that the President's authority to withdraw, limit, or condition any of the IOIA's various immunities "makes sense only if Section 288a(b) establishes a fixed rule of virtually absolute immunity" from suit. Resp. Br. 33. This is incorrect. Section 288a(b) establishes the IOIA's ceiling respecting immunity from suit—today, absolute immunity for nearly all quasi-public acts but not for commercial or other private acts. The President can still lower or condition that immunity as he sees fit. Or, where a "broad[er]" immunity from suit is "warranted by [an] organization's circumstances," Resp. Br. 33, the member states can enshrine that immunity in the organization's charter or Congress can confer it by special statute. *See, e.g.*, *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010) (giving effect to agreement granting absolute immunity to the United Nations); 22 U.S.C. § 286h (special statute implementing abso-

lute immunity for the International Monetary Fund (IMF)); *see also* U.S. Br. 26.

b. The IFC advances three other structural arguments the D.C. Circuit has never adopted—and that, to our knowledge, have never before been propounded by anyone. None is persuasive.

First, the IFC contends that Section 288a(b)'s waiver clause would be "superfluous" if the "same immunity" clause "incorporated by reference the *body* of foreign-state immunity law." Resp. Br. 31. Not so. The ability to waive an immunity or other protection is distinct from the substantive protection itself. *Cf. Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 786 n.4 (1991) (noting that issues of State's Eleventh Amendment immunity and its waiver of that immunity are "wholly distinct"). The waiver clause is therefore irrelevant here.

Second, the IFC argues that Congress would not have provided in Section 288a(c) that their "archives . . . shall be inviolable" unless international organizations are absolutely immune from suit. Resp. Br. 33; *see also id.* 43. But contrary to the IFC's suggestion, no court has held that this "archives" provision—as opposed to Section 288a(b)'s "all forms of judicial process" language—governs immunity from discovery. The cases cited by the IFC involve international agreements that protect not just "archives" but also "documents" from compelled disclosure. *Taiwan v. U.S. Dist. Ct.*, 128 F.3d 712, 718 (9th Cir. 1997).

Whatever the scope of the IOIA's "archives" provision, it is compatible with being subject to civil litigation. The IFC itself admits it "may be sued by purchasers of securities and other direct commercial counterparts." Resp. Br. 9. And all international organizations may *bring* lawsuits. *See* 22 U.S.C. § 288a(a)(iii). Organizations—including the IFC itself—produce discovery in such cases. *See, e.g.*, Mot. in Opp. to Pltf.'s Mot. for Extension of Time to Complete Discovery, *Osserian v. IFC*, No. 1-06-CV-0336 RWR, Doc. 41 (D.D.C. Sept. 10, 2009).

The archives of foreign sovereigns' diplomatic missions are similarly inviolable, yet litigation concerning those missions sometimes occurs. *E.g., Liberian E. Timber Corp. v. Republic of Liberia*, 659 F. Supp. 606, 608 (D.D.C. 1987). Indeed, the FSIA, too, contemplates discovery. *See* 28 U.S.C. § 1605(g).

Third, the IFC asserts that the FSIA's provisions governing attachment or execution of property, 28 U.S.C. §§ 1610-11, demonstrate that Congress did not believe that that statute's provisions regarding immunity from suit and other forms of judicial process would apply to international organizations. Resp. Br. 40-43. These provisions reveal just the opposite. While Section 1610 of the FSIA renders the property of foreign states subject to attachment or execution under certain circumstances, Section 1611 provides: "Notwithstanding the provisions of section 1610 of this chapter, the property of [international organizations] shall not be subject to attachment or any other judicial process" absent satisfaction of additional criteria. 28 U.S.C. § 1611. Congress would

not have enacted Section 1611 unless it assumed that Section 1610, by virtue of the IOIA, would have otherwise governed international organizations. *See, e.g.*, *Pott v. Arthur*, 104 U.S. 735, 736 (1881) ("A thing that is excepted . . . must necessarily belong to the class of things from which it is excepted").

The IFC also contends the FSIA should not apply to international organizations because it applies by its terms only to "foreign states"—a term that "does not include international organizations." Resp. Br. 41. This misunderstands how the reference canon works. The FSIA does not apply to international organizations by its own force. Rather, its provisions governing immunity from suit apply to international organizations by operation *of the IOIA*, which provides that such organizations "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b).

Finally, the IFC professes confusion over whether the IOIA's "same immunity" provision incorporates the FSIA's rules regarding "foreign states" or those regarding foreign "agencies or instrumentalities." Resp. Br. 42 (citing 28 U.S.C. § 1603). The IOIA's reference to "foreign *governments*," 22 U.S.C. § 288a(b) (emphasis added), appears to incorporate both. The word "government" generally "refers collectively to the political organs of a country." Black's Law Dictionary (10th ed. 2014). And the term "foreign government" is used elsewhere in the U.S. Code to mean a state or an "agency" or "instrumentality" thereof. 15 U.S.C. § 78m(q)(1)(B); *see also* 5 U.S.C.

§ 7342(a)(2)(A); 22 U.S.C. § 611(e); 50 U.S.C. § 4565(a)(4). But the Court need not resolve any uncertainty in this case. The FSIA's rules governing "states" and "agenc[ies] and instrumentalit[ies]" are nearly identical, and the commercial activity exception is available here regardless. *See* 28 U.S.C. §§ 1603(a), 1605(a)(2).

3. Legislative History

a. Citing a few statements in the IOIA's legislative history, the IFC maintains that "international organizational immunity rested on *different* principles than foreign-state immunity." Resp. Br. 23 (emphasis added); *see also id.* 21-22, 53. In particular, the IFC contends that international organizational immunity is designed to guard against undue influence "from any one state." *Id.* 22. This argument has multiple problems.

First and foremost, legislative history cannot cancel out a statute's text. *See, e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). The IOIA provides the "same" immunity from suit—nothing more, nothing less—as foreign governments. 22 U.S.C. § 288a(b). That means the two should be treated alike, not differently. *See* Petr. Br. 21-23.

Second, the IOIA's legislative history does not actually point to different immunity principles. The IFC ignores several congressional pronouncements that the goal of the statute was to accord international organizations the same protections as foreign states because they are "organizations made up of a number of foreign governments." Petr. Br. 32 (citation omitted) (collecting authority). Indeed, that was

the argument international organizations themselves pressed when advocating for an immunity statute. *See* Lawrence Preuss, *The International Organizations Immunities Act*, 40 Am. J. Int'l L. 332, 333-34 (1946). Applying the FSIA's rules is the only way to achieve that objective.

Third, even on its own terms, the concern that the United States could exert undue influence over international organizations that do not reserve absolute immunity through their own charters is overblown. The IFC's charter, like other organizations', deems it sufficient to deal with any undue-influence concerns by forbidding suits by member states. IFC Articles, art. 6, § 3. Besides, when a case involving an international organization is in U.S. court, ordinary choice-of-law rules apply. *See, e.g.*, *Do Rosário Veiga v. World Meteorological Org.*, 486 F. Supp. 2d 297, 305 (S.D.N.Y. 2007). (Here, for example, it may be that Indian law governs.) And the IFC never argues that U.S. courts cannot be trusted to apply those rules—and, when appropriate, substantive foreign law itself. Accordingly, there is no danger that mere litigation in U.S. courts might improperly thrust U.S. norms upon international organizations.

b. The IFC also claims that enforcing the IOIA's "same immunity" provision as written would contradict Congress's intention in 1945 to confer absolute immunity on certain organizations. Resp. Br. 34-35. But most of the organizations the IFC names—such as the IMF—are among those that have absolute immunity by virtue of their founding agreements, organization-specific statutes, or both; the IOIA's

"same immunity" provision is irrelevant to those organizations. Petr. Br. 3. By contrast, the IFC has identified no language in its own Articles of Agreement that suggest it was intended to have immunity from suits other than by member states. Indeed, the IFC's charter "was modeled on the World Bank's charter," BIO 31, and the Government understood from the beginning that the World Bank would "be subject to a suit." Constitutionality of the Bretton Woods Agreement Act, at 90 (1945).

That leaves the IFC's reliance on a comment in a House report saying that the IOIA was "substantially similar" to the 1944 British Diplomatic Privileges (Extension) Act. Resp. Br. 35-36. Considering that British law conferred a number of immunities and that U.S. law granted *no* immunities to international organizations before the IOIA, Petr. Br. 4, any statute granting significant immunities would have been "substantially similar" to British law. The overall comparison in the legislative history, therefore, proves little. It certainly cannot affect the specific directive in the IOIA's immunity-from-suit provision to track foreign sovereign immunity law over time.

B. Even if the IOIA Locked in Foreign Sovereign Immunity Law as of 1945, That Would Still Require Applying the FSIA Today.

The IFC does not dispute that *if* foreign sovereign immunity law in 1945 was procedural (that is, simply a rule of deference to the political branches), then applying that rule today would require applying the FSIA. The IFC insists, however, that when

the IOIA was enacted, a *substantive* federal common law rule conferred virtually absolute immunity upon foreign states. Resp. Br. 18.

As petitioners have shown, there was no such substantive rule. In 1945, it was "not for the courts to deny an immunity which our government has seen fit to allow, *or to allow an immunity on new grounds which the government has not seen fit to recognize*." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (emphasis added); *see also* Petr. Br. 37-40. This was a rule of procedural deference to the political branches, not substantive judicial policymaking. Either way of reading the IOIA, therefore, leads to the conclusion that its "same immunity" provision now incorporates the FSIA.

II. THE GOVERNMENT'S PAST AND CURRENT POSITIONS CONFIRM THAT THE "SAME IMMUNITY" PROVISION TRACKS THE FSIA

The IFC suggests that any indeterminacy in the IOIA should be informed by the Executive Branch's understanding of the statute. Resp. Br. 43-49. We agree. The Government's words and deeds confirm that the "same immunity" provision incorporates the FSIA.

1. For decades, the State Department has maintained that international organizational immunity from suit tracks the immunity of foreign sovereigns. *See* U.S. Br. 24-29; Petr. Br. 8-9 & n.2 (citing filings and documents from the administrations of Presidents Carter, George H.W. Bush, Clinton, and Obama). The Government reaffirms that position

here in a brief signed by the Solicitor General and the State Department's Legal Adviser.

Against this present and longstanding expression, the IFC points to a single footnote in a lower court brief. There, the Government recited *Atkinson*'s holding that the IOIA confers absolute immunity upon international organizations. Resp. Br. 49 (citing U.S. Br. 17 n.*, *EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2d Cir. Apr. 5, 2006) (No. 06-403)). But the meaning of the IOIA's "same immunity" provision was not even at issue in that case. The Government's citation, therefore, cannot blunt the import of everything before and since—namely, the Government's repeated explanation, in every instance where it has mattered, that the IOIA incorporates the FSIA. *See* U.S. Br. 28-29.

2. Contrary to the IFC's assertions, executive and congressional practice regarding specific international organizations also aligns with the Government's longstanding interpretation of the IOIA.

a. *United Nations (U.N.).* In 1970, the United States ratified the Convention on Privileges and Immunities of the U.N. (CPIUN), which affords the U.N. absolute immunity from suit. All agree, therefore, that the IOIA's "same immunity" provision has long been irrelevant to the U.N. *See* U.S. Br. 32; BIO 28. The IFC argues, however, that governmental actions regarding the U.N. before 1970 show it believed the IOIA provided absolute immunity to international organizations. The IFC is mistaken.

Before 1970, the U.N. Charter committed the United States to afford the U.N. only "such privileg-

es and immunities as are *necessary* for the fulfilment of its purposes." U.N. Charter, art. 105, § 1 (emphasis added). There is no evidence the Government thought following the restrictive theory of immunity was insufficient to fulfill that obligation. To the contrary, the 1952 Tate Letter generally afforded absolute immunity to covered entities unless they engaged in commercial activity. *See* Petr. Br. 7. And the IFC offers no evidence that the U.N. engaged in any commercial activity between the Tate Letter and U.S. ratification of the Convention that was critical to fulfill its objectives. Thus, ratification of the CPIUN did not materially change the U.N.'s immunity in any way that mattered.

More fundamentally, the IFC's conception of the pre-1970 state of affairs cannot be squared with the very existence of the CPIUN. If member states believed that the U.N. Charter *already* required member states to confer absolute immunity, the CPIUN would have been unnecessary. Accordingly, the better—and widely held—view of the Convention is that it "expand[ed] the U.N.'s immunity from functional immunity to something closer to absolute immunity." Farhana Choudhury, *The United Nations Immunity Regime: Seeking a Balance Between Unfettered Protection and Accountability*, 104 Geo. L.J. 725, 732 (2016); *see also* Kristen E. Boon, *The United Nations as Good Samaritan: Immunity and Responsibility*, 16 Chi. J. Int'l L. 341, 354 (2016).

b. *U.N. organizations.* The IFC next argues that the restrictive theory is insufficient for the United States to honor immunity provisions in certain U.N.

organizations' founding documents that were not self-executing. Resp. Br. 46. The IFC is incorrect

To begin, the IFC gives no good reason to believe the immunity provisions in the founding documents it references are not self-executing. The IFC simply cites the documents themselves and *Bond v. United States*, 134 S. Ct. 2077, 2084 (2014). But *Bond* concerned the Chemical Weapons Convention, and the nature of one treaty does not control whether a completely different treaty—or even a different provision in the same treaty—is self-executing. *Medellin v. Texas*, 552 U.S. 491, 508-11 (2008). This Court, moreover, has found some treaties constituting U.N. agencies to be self-executing. *See, e.g.*, *Warren v. United States*, 340 U.S. 523, 526 (1951) (International Labor Organization (ILO)).

Even if these provisions are not self-executing, there is still no reason to believe that applying the restrictive theory to those organizations renders the United States noncompliant. The founding documents of the U.N. Educational, Scientific and Cultural Organization (UNESCO), the ILO, and the Food and Agriculture Organization afford immunity only as "necessary" to fulfill these organizations' functions. Resp. Br. 46. The IFC does not argue that restrictive immunity provides insufficient protection for these organizations to function. Nor would any such argument hold water.

c. *International Centre for Settlement of Investment Disputes (ICSID)*. The IFC's arguments regarding ICSID likewise fall flat.

The ICSID Convention provides that the organization "shall enjoy immunity from all legal process, except when the Centre waives this immunity." Convention on the Settlement of Investment Disputes, § 6, art. 19 (Oct. 14, 1966). The IFC claims this provision is not self-executing. Resp. Br. 47. But no court has addressed that question. And the Executive Branch has treated the ICSID's immunity provision as effective without further U.S. action. Although the United States ratified the ICSID Convention in 1966, and the organization is headquartered in Washington, D.C., the President did not designate ICSID as an "international organization" entitled to IOIA immunity until 1977. Exec. Order No. 11966, 42 Fed. Reg. 4331 (Jan. 19, 1977). If the ICSID Convention were not self-executing, then ICSID would have had *no* immunity for these eleven years.

Congress's historical treatment of ICSID is in accord. In 1966, Congress enacted the Convention on the Settlement of Investment Disputes Act, "to facilitate the carrying out of the obligations of the United States" under the ICSID Convention. Pub. L. No. 89-532, 80 Stat. 344 (Aug. 11, 1966). But this law did not address immunity from suit. *See* 22 U.S.C. §§ 1650-1650a. The most plausible reason is that Congress, like the Executive Branch, understood the ICSID Convention's immunity provisions to be self-executing.

d. *Other organizations.* Various other international organizations as amici similarly claim that the IOIA's "same immunity" provision cannot mean what it says because that would be inconsistent with

U.S. interests. The United States itself, of course, disagrees. And for good reason. The status of all international organizations mentioned in the briefing appears as an Appendix to this brief; but in a nutshell: Some of the organizations have specific statutes[1] or ratified treaties[2] granting them immunity from suit, rendering the IOIA irrelevant. Others have charters that expressly incorporate the IOIA or functional immunity principles, with no evidence those are insufficient to safeguard U.S. interests.[3] Still others have no immunity provision in their charters.[4] For other organizations, the United States is not even a member state, so the U.S. has no obli-

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[1] 22 U.S.C. § 286h (IMF and International Bank for Reconstruction and Development); *id.* § 290i-8 (African Development Bank); *id.* § 283hh (Inter-American Investment Corporation); *id.* § 283g (International Development Bank); *id.* § 290k-10 (Multilateral Investment Guarantee Agency);; Pub. L. No. 89-369, 80 Stat. 72, § 9 (Mar. 16, 1966) (Asian Development Bank); Pub. L. No. 101-513, 104 Stat. 1979, 2035 (Nov. 5, 1990) (European Bank for Reconstruction and Development).

[2] Agreement Establishing the International Fund for Agricultural Development, art. 10, § 2(a) (June 13, 1976); North Pacific Marine Science Organization Convention, art. IX(ii) (Mar. 24, 1992).

[3] *See* Convention on the Organization of Economic Cooperation and Development, Supplementary Protocol No. 2 (Dec. 14, 1990); World Health Organization Const., arts. 66-67 (July 22, 1946).

[4] *See* Convention on Great Lakes Fisheries (Sept. 10, 1954); Convention between the United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (Mar. 2, 1953).

gations to them, and they are generally ineligible for immunity under the IOIA.[5]

All told, the United States has carefully managed its obligations to, and participation in, international organizations. And now, after reviewing those commitments, the United States urges this Court to enforce the IOIA "same immunity" mandate as written. The Court should do so.

III. THE IFC'S POLICY ARGUMENTS ARE UNAVAILING.

Finally, the IFC musters a series of policy arguments to urge this Court to confer absolute immunity on international organizations. Whatever their merit, these arguments provide no basis to deviate from the IOIA's plain text. "The role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Burrage v. United States*, 571 U.S. 204, 218 (2014) (quotations and alteration omitted). But even on their own terms, none of the IFC's arguments is persuasive.

1. Citing court decisions from other countries and some academic publications, the IFC contends that applying the restrictive theory of immunity to international organizations would be out of step with international norms. Resp. 22, 51-52. But the IOIA's

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[5] These include the Black Sea Trade and Development Bank, the Caribbean Development Bank, the Council of Europe Development Bank, and the Nordic Investment Bank. The U.S. also is not a member of the African Union and the U.N. Industrial Development Organization, but they are eligible for immunity pursuant to a special statute, 22 U.S.C. § 288f-2.

command is hardly outside the mainstream. Countries such as Italy, Greece, and Russia also apply the restrictive theory to international organizations. *See FAO v. INPDAI*, 87 ILR 1 (Court of Cassation 1982); Riccardo Pavoni, *Italy*, in The Privileges and Immunities of International Organizations in Domestic Courts 155, 155-71 (August Reinisch ed., 2013); Sergei Yu Marochkin, *Russia*, in The Privileges and Immunities of International Organizations in Domestic Courts 221, 232 (August Reinisch ed., 2013); Maria Gavouneli, *Greece*, in The Privileges and Immunities of International Organizations in Domestic Courts 131, 131-39 (August Reinisch ed., 2013). And leading U.S. scholars (some of whom previously served as top lawyers in the State Department) agree the restrictive theory is a "coherent, workable approach" that is "far more appropriate than a supposed rule of absolute immunity that was already on its way out in 1945"—and that virtually no country follows today. Amicus Br. of Professors of International Organization and International Law 20.

2. The IFC argues that allowing international organizations to be sued under the IOIA based on commercial conduct could frustrate their ability to carry out their missions. Resp. Br. 53-57. These arguments are unpersuasive as to both international organizations generally and the IFC in particular.

a. For starters, there are numerous ways besides the IOIA that international organizations limit their exposure to litigation. Many organizations, for instance, "enjoy immunity from suit under their founding treaties and thus need not rely on the immunity

conferred by the IOIA." BIO 27-28. The IMF is a good example, and the CPIUN follows the same approach. *Id.*; Petr. Br. 3. Additionally, organizations like the IFC may include provisions in their loan agreements that indemnify them against damages and legal expenses. *See* D. Ct. Dkt. 10-5, 10-6 Schedule 1, at 123, 132. If these options prove inadequate, organizations can change their charters or lobby Congress for a special immunity statute of their own.

b. The IFC also exaggerates by suggesting (Resp. Br. 58-59), that the IOIA subjects international organizations to suit in the United States for *all* commercial conduct. The FSIA's commercial activity exception requires commercial conduct at issue to have a sufficient nexus to the United States. 28 U.S.C. §§ 1603, 1605(a)(2); *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015); *see also* U.S. Br. 32-33. This limitation and others explain why the "flood" of litigation the IFC imagines, Resp. Br. 60, has not materialized in the Third Circuit and will not materialize elsewhere. *See Cal. Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042, 2054 (2017) (dismissing similar concern as "likely . . . overstated").

c. The IFC falls back on the assertion that "[e]ven one such suit" would irreparably chill its lending activities. Resp. Br. 56. But this is manifestly untrue. The IFC's own Articles of Agreement include a "broad" provision *allowing* lawsuits against it, Pet. App. 31a—a provision the IFC describes as allowing it to be sued by "direct commercial counterparts." Resp. Br. 9; *see also, e.g., Osseiran v. IFC*, 552

F.3d 836 (D.C. Cir. 2009); *Oliver Res. PLC v. IFC*, 62 F.3d 128 (5th Cir. 1995). And yet the IFC continues to operate effectively. Moreover, other lending institutions—private and public—are able to perform their core functions despite the fact that they are subject to suit for commercial malfeasance.

That leaves the IFC's contention that lawsuits "like this one" are particularly problematic. Claims seeking to hold the IFC liable for violating its "self-imposed" sustainability standards, the IFC argues, could cause it to abandon those standards. Resp. Br. 54-56. But even assuming the IFC's management could abandon its mission, this contention misapprehends petitioners' complaint. Petitioners seek to hold the IFC liable for violating tort and contract law. *See* Petr. Br. 11. Violations of an organization's own internal standards might sometimes be relevant evidence supporting such a claim—just as a private business's breach of its internal protocols might. But petitioners' claims ultimately turn on external law, not those standards.

3. The IFC's foreign relations objections are similarly misconceived. While the supervisory decision-making at issue here occurred in the United States, the IFC complains that applying the restrictive theory would allow U.S. courts to adjudicate cases involving conduct that occurred abroad. Resp. Br. 55-57. But provided the defendant has sufficient contacts to the United States, there is nothing necessarily illegitimate about claims "based on activities and events elsewhere." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011). Similar principles apply in

breach-of-contract cases. *See, e.g.*, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992).

Lest there be any doubt, in the Tate Letter and the FSIA, the Executive Branch and Congress determined that it is appropriate in circumstances equivalent to those here for U.S. courts to sit in judgment *of foreign sovereigns*. If that is tolerable, then surely allowing lawsuits involving the commercial activities of international organizations is acceptable. *See* U.S. Br. 32-34.

Moreover, some international organizations execute projects entirely within the United States. *See* Petr. Br. 3. Yet the IFC and its amici seek a rule that would place misconduct during even those projects—no matter how egregious, and no matter how harmful to U.S. citizens and interests—completely beyond the reach of the law. Congress wisely rejected any such approach, determining in the IOIA that no misdeeds that would subject a foreign sovereign to suit should be immunized with respect to international organizations. The Executive agrees. This Court should enforce that statute here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

International Organizations Mentioned in Briefing

ORGANIZATION	IMMUNITY	IOIA DESIGNATION
African Development Bank[1]	Provided by statute, 22 U.S.C. § 290i-8	Exec. Order No. 12403, 48 Fed. Reg. 6087 (Feb. 8, 1983)
African Development Fund	Provided by statute, 22 U.S.C. § 290g-7	Exec. Order No. 11977, 42 Fed. Reg. 14,671 (Mar. 14, 1977)
African Union	The United States is not a party	Exec. Order No. 13377, 70 Fed. Reg. 20,263 (Apr. 13, 2005)
Asian Development Bank	Provided by statute, 80 Stat. 72, § 9	Exec. Order. No. 11334, 32 Fed. Reg. 3933 (Mar. 7, 1967)
Black Sea Trade and Development Bank	The United States is not a party	N/A
Border Envi-	Provided by	Exec. Order

[1] The Nigerian Trust Fund—*see* Amicus Br. of International Bank for Reconstruction and Development 1—is a component of the African Development Bank and its immunities are tied to that afforded the Bank, *see* Agreement Establishing the Nigerian Trust Fund, art. XV.

ronmental Co-operation Commission	statute, 107 Stat. 2057, § 542	No. 12904, 59 Fed. Reg. 13,179 (Mar. 16, 1994)
Caribbean Development Bank	The United States is not a party	N/A
Council of Europe Development Bank	The United States is not a party	N/A
European Bank for Reconstruction and Development	Provided by statute, 104 Stat. 1979, 2034	Exec. Order No. 12766, 56 Fed. Reg. 28,463 (June 18, 1991)
European Space Agency	The United States is not a party	Exec. Order No. 11318, 31 Fed. Reg. 15,307 (Dec. 5, 1966); Exec. Order No. 11351, 32 Fed. Reg. 7561 (May 22, 1967); Exec. Order No. 11760, 39 Fed. Reg. 2343 (Jan. 17, 1974); Exec. Order No. 12766, 56 Fed. Reg. 28,463 (June 18, 1991)

Food and Agriculture Organization (FAO)	No implementing legislation or ratified treaty, but agreement only requires members to provide immunities "insofar as it may be possible under [their] constitutional procedure," FAO Const., art. XVI, § 2	Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946)
Great Lakes Fishery Commission	No immunity provision in agreement	Exec. Order No. 11059, 27 Fed. Reg. 10,405 (Oct. 23, 1962)
Inter-American Development Bank	Provided by statute, 22 U.S.C. § 283g	Exec. Order No. 10873, 25 Fed. Reg. 3097 (Apr. 8, 1960); Exec. Order No. 11019, 27 Fed. Red. 4145 (Apr. 27, 1962)
Inter-American Investment Corporation	Provided by statute, 22 U.S.C. § 283hh	Exec. Order No. 12567, 51 Fed. Reg. 35,495 (Oct. 2, 1986)

Inter-American Tropical Tuna Commission	No immunity provision in agreement	Exec. Order No. 11059, 27 Fed. Reg. 10,405 (Oct. 23, 1962)
International Bank for Reconstruction and Development (World Bank)	Ratified treaty, 1 U.S.T. 1942	Exec. Order No. 9751, 11 Fed. Reg. 7713 (July 11, 1946)
International Boundary and Water Commission	No immunity provision in agreement	Exec. Order No. 12467, 49 Fed. Reg. 8229 (Mar. 2, 1984)
International Centre for Settlement of Investment Disputes	Presumed to be self-executing, *see* Reply Br. 19	Exec. Order No. 11966, 42 Fed. Reg. 4331 (Jan. 19, 1977)
International Cotton Institute	Ratified treaty, 17 U.S.T. 83	Exec. Order No. 11283, 31 Fed. Reg. 7667 (May 27, 1966)
International Criminal Police Organization (Interpol)	No immunity provision in agreement	Exec. Order No. 12425, 48 Fed. Reg. 28,069 (June 16, 1983); Exec. Order No. 12971, 60 Fed. Reg. 48,617

		(Sept. 15, 1995); Exec. Order No. 13524, 74 Fed. Reg. 67,803 (Dec. 16, 2009)
International Finance Corp.	Provided in part by statute, 22 U.S.C. § 282g	Exec. Order No. 10680, 21 Fed. Reg. 7647 (Oct. 2, 1956)
International Food Policy Research Institute	No immunity provision in agreement	Exec. Order No. 12359, 47 Fed. Reg. 17,791 (Apr. 22, 1982)
International Fund for Agricultural Development	Ratified treaty, 28 U.S.T. 8435	Exec. Order No. 12732, 55 Fed. Reg. 46,489 (Oct. 31, 1990)
International Fusion Energy Organization	No implementing legislation or ratified treaty, but agreement only requires "such privileges and immunities as are necessary for the exercise of its functions," T.I.A.S. 07-1024	Exec. Order No. 13451, 72 Fed. Reg. 224 (Nov. 21, 2007)

International Labor Organization	Ratified treaty, 49 Stat. 2712; *see also* 22 U.S.C. § 288f-2	Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946)
International Monetary Fund	Provided by statute, 22 U.S.C. § 286h	Exec. Order No. 9751, 11 Fed. Reg. 7713 (July 11, 1946)
International Pacific Halibut Commission	No immunity provision in agreement	Exec. Order No. 11059, 27 Fed. Reg. 10,405 (Oct. 23, 1962)
International Telecommunications Satellite Organization (INTELSAT)[2]	Repealed in light of privatization, 47 U.S.C. §§ 701-744	Exec. Order No. 11718, 38 Fed. Reg. 12,797 (May 14, 1973); Exec. Order No. 11966, 42 Fed. Reg. 4331 (Jan. 19, 1977)
International Union for Conservation of Nature and Natural Resources	No immunity provision in agreement	Exec. Order No. 12986, 61 Fed. Reg. 1693 (Jan. 18, 1996)
Multilateral	No implement-	Exec. Order

[2] The Interim Communications Satellite Committee, *see* Amicus Br. of International Law Experts 23 n.6, is part of INTELSAT. *See* 15 U.S.T. 1705, art. IV(a), (b).

Investment Guarantee Agency (MIGA)	ing legislation or ratified treaty, but agreement allows MIGA to be sued in the United States, *see* MIGA Convention, art. 44	No. 12647, 53 Fed. Reg. 29,323 (Aug. 2, 1988)
Nordic Investment Bank	The United States is not a party	N/A
North American Development Bank	Provided by statute, 107 Stat. 2057, § 542	Exec. Order No. 12904, 59 Fed. Reg. 13,179 (Mar. 16, 1994)
Organization for European Economic Cooperation (OECD)	Ratified treaty, 12 U.S.T. 1728	Exec. Order No. 10133, 15 Fed. Reg. 4159 (June 27, 1950)
Pacific Salmon Commission	Ratified treaty, 1985 U.S.T. LEXIS 57, but no immunity provision in agreement	Exec. Order No. 12567, 51 Fed. Reg. 35,495 (Oct. 2, 1986)
United Nations (U.N.)	Ratified treaty, 21 U.S.T. 1418	Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946)

U.N. Educational, Scientific, and Cultural Organization	U.S. has withdrawn effective Dec. 31, 2018	Exec. Order No. 9863, 12 Fed. Reg. 3559 (May 31, 1947)
U.N. Industrial Development Organization	Provided by statute, 22 U.S.C. § 288f-2	Exec. Order No. 12628, 53 Fed. Reg. 7725 (Mar. 8, 1988)
U.N. Relief and Rehabilitation Administration	Organization is defunct, *see* Fernando Chang-Muy, ***International Refugee Law in Asia***, 24 N.Y.U. J. In'tl L. & Politics 1171, 1172 (1992)	Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946)
United States-Mexico Border Health Commission	Ratified treaty, 2000 U.S.T. Lexis 199	Exec. Order No. 13367, 69 Fed. Reg. 77,605 (Dec. 21, 2004)
World Health Organization	No implementing legislation or ratified treaty, but agreement only requires "such privileges and immunities as may be neces-	Exec. Order No. 10025, 13 Fed. Reg. 9361 (Dec. 30, 1948)

	sary for the fulfilment of its objective and for the exercise of its functions," WHO Const., art. 67(a)	
World Intellectual Property Organization	Ratified treaty, 1970 U.S.T. Lexis 597	Exec. Order No. 11866, 40 Fed. Reg. 26,015 (June 18, 1975)
World Tourism Organization	Ratified treaty, 1970 U.S.T. Lexis 616	Exec. Order No. 12508, 50 Fed. Reg. 11,837 (Mar. 22, 1985)
World Trade Organization	Provided by statute, Pub. L. No. 103-465, 108 Stat. 4809 (1994)	Exec. Order No. 13042, 62 Fed. Reg. 18,017 (Apr. 9, 1997)

No. 17-1011

In the Supreme Court of the United States

BUDHA ISMAIL JAM, ET AL., PETITIONERS

v.

INTERNATIONAL FINANCE CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

The International Organizations Immunities Act generally affords international organizations "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. 288a. The question presented is whether the immunity of international organizations from suit and other judicial process is governed by the immunity standards applicable to foreign governments when the statute was enacted in 1945 or those applicable to foreign governments today.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 10
Argument:
The International Organizations Immunities Act affords designated international organizations the same jurisdictional immunity as is currently enjoyed by foreign states 13
A. The text, structure, and history of the IOIA support application of the same immunity enjoyed by foreign states to international organizations 14
B. The conduct of the political Branches following enactment of the IOIA supports affording international organizations the jurisdictional immunity currently enjoyed by foreign sovereigns 24
C. The court of appeals' view of international organization immunity would present practical problems and is not required by respondent's policy concerns 29
Conclusion 35

TABLE OF AUTHORITIES

Cases:

Alfred Dunhill of London, Inc. v. *Republic of Cuba*, 425 U.S. 682 (1976) 5
Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 6
Atkinson v. *Inter-American Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998) 8, 9, 21, 23, 30
Barrett v. *United States*, 423 U.S. 212 (1976) 14
Berizzi Bros. Co. v. *Steamship Pesaro*, 271 U.S. 562 (1926) 17, 30

Cases—Continued: Page

Burrage v. *United States*, 571 U.S. 204 (2014) 31
Bzrak v. *United Nations*, 597 F.3d 107 (2d Cir.), cert. denied, 562 U.S. 948 (2010) 32
Carr v. *United States*, 560 U.S. 438 (2010) 14
Chickasaw Nation v. *United States*, 534 U.S. 84 (2001) 20
Crosby v. *National Foreign Trade Council*, 530 U.S. 363 (2000) 24
Culver v. *People*, 43 N.E. 812 (Ill. 1896) 15
Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 14
El Encanto, Inc. v. *Hatch Chile Co.*, 825 F.3d 1161 (10th Cir. 2016) 15
Gaston v. *Lamkin*, 21 S.W. 1100 (Mo. 1893) 16
Gwaltney of Smithfield, Ltd v. *Chesapeake Bay Found., Inc.* 484 U.S. 49 (1987) 15
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 20
K Mart Corp. v. *Cartier, Inc.*, 486 U.S. 281 (1988) 16
Leo Sheep Co. v. *United States*, 440 U.S. 668 (1979) 17
Medellin v. *Texas*, 552 U.S. 491 (2008) 26
Mendaro v. *World Bank*, 717 F.2d 610 (D.C. Cir. 1983) 8, 9
Murphy v. *Smith*, 138 S. Ct. 784 (2018) 15
OBB Personenverkehr AG v. *Sachs*, 136 S. Ct. 390 (2015) 33
Permanent Mission of India to the U.N. v. *City of N.Y.*, 551 U.S. 193 (2007) 14
Piper Aircraft Co. v. *Reyno*, 454 U.S. 235 (1981) 33
Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 4, 5, 31
Republic of Mexico v. *Hoffman*, 324 U.S. 30 (1945) 18, 31
Samantar v. *Yousuf*, 560 U.S. 305 (2010) 4, 29, 30
Sebelius v. *Cloer*, 133 S. Ct. 1886 (2013) 16

Cases—Continued: Page

The Pesaro, 277 F. 473 (S.D.N.Y. 1921) 17, 30
The Schooner Exchange v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812) 18
United States v. *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929) 31
United States v. *Rodriguez-Rodriguez*, 863 F.2d 830 (11th Cir. 1989) 15
United States v. *Wilson*, 503 U.S. 329 (1992) 14
Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 5, 6, 18, 30

Treaties, statutes, and regulations:

Agreement Establishing the Asian Development Bank, art. 50, *entered into force* Aug. 22, 1966, 17 U.S.T. 1418, T.I.A.S. No. 6103 32
Articles of Agreement of the International Development Association, *entered into force* Sept. 24, 1960, 11 U.S.T. 2284, T.I.A.S. No. 4607 25
Articles of Agreement of the International Finance Corporation, *entered into force* July 20, 1956, 7 U.S.T. 2197, T.I.A.S. No. 3620 7
art. I 7
art. I(i) 7
art. VI, § 3 ..... 7, 8, 26, 27
Articles of Agreement of the International Monetary Fund, *entered into force* Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39 26
art. IX, § 3 27
Charter of the Organization of American States, art. 103, *entered into force* Dec. 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361 27

Treaties, statutes, and regulations—Continued: Page

Convention on the Privileges and Immunities of the Specialized Agencies, art. III, §4, *entered into force* Dec. 2, 1948, 33 U.N.T.S. 261 26

Convention on the Privileges and Immunities of the United Nations, *entered into force* Apr. 29, 1970, 21 U.S.T. 1418, T.I.A.S. No. 6900 32

Headquarters Agreement Between the Government of the United States of America and the Organization of American States, art. IV, § 1, *signed at Washington* May 14, 1992, S. Treaty Doc. No. 40, 102d Cong., 2d Sess. (1992) 27, 28

Marrakesh Agreement Establishing the World Trade Organization, art. VIII(4), *entered into force* Jan. 1, 1995, 1867 U.N.T.S. 154 26

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.* 6

28 U.S.C. 1604 6

28 U.S.C. 1605(a)(1)-(6) 24

28 U.S.C. 1605(a)(2) 6, 33, 34

28 U.S.C. 1605(a)(5) 6

International Finance Corporation Act, Pub. L. No. 84-350, 69 Stat. 669 (1955) (22 U.S.C. 282 *et seq.*):

§ 2, 22 U.S.C. 282 7

§ 8, 22 U.S.C. 282f 7

§ 9, 22 U.S.C. 282g 7, 26

International Organizations Immunities Act, Pub. L. No. 79-291, 59 Stat. 669 (22 U.S.C. 288 *et seq.*) 2

22 U.S.C. 288 ..... *passim*

22 U.S.C. 288a ..... *passim*

22 U.S.C. 288a-288e 2

22 U.S.C. 288a(a) 2

22 U.S.C. 288a(b) ..... *passim*

Statutes and regulations—Continued: Page

§ 2(c), 22 U.S.C. 288a(c) 3, 16, 20
22 U.S.C. 288a(d) 3, 16
§ 3, 22 U.S.C. 288b 4, 20
§ 6, 22 U.S.C. 288c 3, 16, 20
22 U.S.C. 288d 16
22 U.S.C. 288d(a) 3
§ 7(b), 22 U.S.C. 288d(b) 3, 16, 20
Suits in Admiralty Act, Pub. L. No. 66-156, 41 Stat. 525 (1920) (46 U.S.C. 30901 *et seq.*) 5
19 U.S.C. 3511(b) 26
22 U.S.C. 284 25
22 U.S.C. 285g 32
22 U.S.C. 286h 26
Exec. Order No. 9698, 11 Fed. Reg. 1809 (1946) 2
Exec. Order No. 10,533, 19 Fed. Reg. 3289 (1954) 27
Exec. Order No. 10,680, 21 Fed. Reg. 7647 (1956) 8
Exec. Order No. 11,718, 38 Fed. Reg. 12,797 (1973) 22
Exec. Order No. 11,966, 42 Fed. Reg. 4331 (1977) 25
Exec. Order No. 12,425, 48 Fed. Reg. 28,069 (1983) 22

Miscellaneous:

91 Cong. Rec. (1945):
p. 10,867 19
p. 12,432 ..... 19, 23
p. 12,530 23
p. 12,531 20
p. 12,532 19
140 Cong. Rec. 28,361 (1994) 28
H.R. No. 4489, 79th Cong., 1st Sess. (1945) 10, 19, 20
2 Green Haywood Hackworth, *Digest of International Law* (1941) 17

Miscellaneous—Continued: Page

Letter from Roberts B. Owen, Legal Adviser, to Leroy D. Clark, Gen. Counsel, Equal Emp't Opportunity Comm'n (June 24, 1980) 28

Letter from Jack B. Tate, Acting Legal Adviser, to the Attorney General (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976) 5, 6, 16, 17, 18, 24

Letter from Detlev F. Vagts, Office of the Legal Adviser, to Robert M. Carswell, Jr., Organization of American States (Mar. 24, 1977) 28, 30

S. Rep. No. 861, 79th Cong., 1st Sess. (1945) 9, 20, 23, 34

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 15

2B Norman J. Singer, et al., *Sutherland Statutes & Statutory Construction* (7th ed. rev. 2012) 15

2 J. G. Sutherland, *Sutherland Statutes & Statutory Construction* (John Lewis ed. 1904) 15

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INTEREST OF THE UNITED STATES

The United States' participation in international organizations is a critical component of the Nation's foreign relations and reflects an understanding that robust multilateral engagement is a crucial tool in advancing national interests. The United States participates in or supports nearly 200 international organizations and other multilateral entities, including major international financial institutions such as the International Monetary Fund (IMF) and the World Bank. The United States contributes billions of dollars annually to those organizations and entities. In recognition of the United States' leadership role, nearly 20 international organizations are headquartered in the United States, and many others have offices here. For these reasons, the United States has a substantial interest in the proper

interpretation of the provisions of the International Organizations Immunities Act (IOIA or Act), 22 U.S.C. 288 *et seq.*, that define international organizations' amenability to suit in the United States.

STATEMENT

1. a. Congress enacted the IOIA in 1945 to provide certain privileges and immunities to international organizations, their officers, and employees. See Pub. L. No. 79-291, 59 Stat. 669 (22 U.S.C. 288, *et seq.*). The Act defines "international organization" as "a public international organization in which the United States participates" pursuant to a treaty or an Act of Congress, and which is designated by the President in an Executive Order "as being entitled to enjoy the privileges, exemptions, and immunities" provided by the Act. 22 U.S.C. 288; see, *e.g.*, Exec. Order No. (EO) 9698, 11 Fed. Reg. 1809 (1946) (designating, among others, the United Nations and the Pan American Union). The Act then grants such international organizations the capacity to contract, to acquire and dispose of real and personal property, and to sue "to the extent consistent with the instrument creating them," 22 U.S.C. 288a(a), as well as a series of privileges, exemptions, and immunities. See 22 U.S.C. 288a-288e.

Some of these privileges, exemptions, and immunities are provided by reference to comparable privileges, exemptions, and immunities enjoyed by foreign states. Of greatest relevance here, the Act provides:

> International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the

> purpose of any proceedings or by the terms of any contract.

22 U.S.C. 288a(b). With respect to customs duties and taxes imposed on imported items, the registration of foreign agents, and the treatment of official communications, the IOIA likewise grants international organizations the "privileges, exemptions, and immunities * * * accorded under similar circumstances to foreign governments." 22 U.S.C. 288a(d). And the IOIA similarly affords the representatives of foreign governments to international organizations, the officers and employees of such organizations, and immediate family residing with such individuals "the same privileges, exemptions, and immunities" under immigration law "as are accorded under similar circumstances to officers and employees, respectively, of foreign governments, and members of their families." 22 U.S.C. 288d(a).

Other privileges, exemptions, and immunities are provided without reference to those enjoyed by foreign governments. The property and assets of international organizations, for example, are "immune from search, unless such immunity [is] expressly waived, and from confiscation." 22 U.S.C. 288a(c). Similarly, international organizations are "exempt" from all federal property taxes. 22 U.S.C. 288c. Representatives of foreign governments to international organizations, as well as officers and employees of such organizations, are "immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions," absent waiver by the foreign government or the international organization. 22 U.S.C. 288d(b). And the "baggage and effects" of those persons and their families are admitted into the United

States "free of customs duties" or importation taxes. 22 U.S.C. 288b.

Finally, the IOIA authorizes the President to "withhold or withdraw," or to "condition or limit," any of the privileges, exemptions, and immunities provided by the Act "in the light of the functions performed by any [designated] international organization." 22 U.S.C. 288. It further authorizes the President to revoke an entity's designation as an international organization if the President determines that the organization or its personnel have "abuse[d] * * * the privileges, exemptions, and immunities provided [by the Act] or for any other reason." *Ibid.*

b. When Congress enacted the IOIA in 1945, the immunity of foreign states was determined by a "two-step procedure." *Samantar* v. *Yousuf*, 560 U.S. 305, 311 (2010). First, a foreign state "could request a 'suggestion of immunity' from the State Department." *Ibid.* (citation omitted). "If the request was granted, the district court surrendered its jurisdiction." *Ibid.* Second, if the State Department did not inform the court of its views concerning the foreign state's immunity, the court "had authority to decide for itself whether all the requisites for such immunity existed," *i.e.*, "whether the ground of immunity is one which it is the established policy of the [State Department] to recognize." *Id.* at 311-312 (citations omitted).

Historically, the State Department generally subscribed to the "classical or absolute" theory of foreign sovereign immunity. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 690 (2004) (citation omitted). Under that theory, "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign."

Ibid. (citation omitted). Accordingly, "the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). In 1952, however, the State Department announced its adoption of the "restrictive" theory of foreign sovereign immunity, under which foreign states generally are afforded immunity only for their sovereign or public acts, and not for their commercial or other private acts. See Letter from Jack B. Tate, Acting Legal Adviser, to the Attorney General (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-714 (1976) (*Tate Letter*).

In the *Tate Letter*, the State Department noted that "for some time" it had "consider[ed] the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed." 425 U.S. at 711. The Department explained that there were "two conflicting concepts of sovereign immunity, each widely held and firmly established." *Ibid.* And it observed that, although the United States had generally followed the absolute theory, international practice had been trending towards the restrictive theory since at least the 1920s. See *id.* at 712-713. Indeed, the United States itself had "adopted a policy of not claiming immunity for its public owned or operated merchant vessels"—a context of some "importance" in the "field of sovereign immunity." *Id.* at 713; see Suits in Admiralty Act, Pub. L. No. 66-156, 41 Stat. 525 (1920) (46 U.S.C. 30901 *et seq.*).

The Department reasoned that by 1952, "with the possible exception[s]" of the United Kingdom and the Soviet Union, "little support ha[d] been found * * * for

continued full acceptance of the absolute theory." *Tate Letter*, 425 U.S. at 714. It noted that continuing to grant foreign governments absolute immunity in U.S. courts would be inconsistent with the United States' practice of "subjecting itself to suit in these same courts in both contract and tort." *Ibid.* And the Department reasoned that the "widespread and increasing practice on the part of governments of engaging in commercial activities ma[de] necessary a practice which w[ould] enable persons doing business with them to have their rights determined in the courts." *Ibid.* Accordingly, the State Department announced that "it w[ould] [t]hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." *Ibid.*

c. Congress subsequently enacted the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, codifying, "as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden*, 461 U.S. at 488. The FSIA now provides the sole basis for obtaining jurisdiction over a foreign state in a civil case brought in a U.S. court. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989). Under the FSIA, foreign states and their agencies and instrumentalities are immune unless a claim falls within one of the statute's specified exceptions. 28 U.S.C. 1604. The exceptions permit, *inter alia*, certain actions against a foreign state that arise out of its commercial activities, 28 U.S.C. 1605(a)(2), and certain torts committed in the United States, 28 U.S.C. 1605(a)(5).

2. a. Respondent International Finance Corporation (IFC) is an international organization established by an international agreement to which the United

States is a party. See Articles of Agreement of the International Finance Corporation, *entered into force* July 20, 1956, 7 U.S.T. 2197, T.I.A.S. No. 3620 (Articles of Agreement). The IFC's purpose is "to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas," by among other things, making investments in cases "where sufficient private capital is not available on reasonable terms." *Id.* art. I, I(i). The Articles of Agreement provide that "[a]ctions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office" or other specified connection. *Id.* art. VI, § 3. Actions "brought by members" of the IFC "or persons acting for or deriving claims from members" are prohibited. *Ibid.* The Articles of Agreement further provide for the immunity of IFC property from "seizure, attachment or execution before the delivery of final judgment against Corporation." *Ibid.*

Shortly after the United States signed the Articles of Agreement, Congress enacted the International Finance Corporation Act, authorizing the President "to accept membership for the United States" in the IFC. Pub. L. No. 84-350, § 2, 69 Stat. 669 (1955) (22 U.S.C. 282). The statute also provides for original jurisdiction in United States district courts over any suit brought against the IFC "in accordance with the Articles of Agreement." *Id.* § 8 (22 U.S.C. 282f). And it provides "full force and effect in the United States" to, among other provisions, article VI, § 3 of the Articles of Agreement, relating to the IFC's amenability to suit. *Id.* § 9 (22 U.S.C. 282g). The President subsequently designated the IFC as an international organization "entitled

to enjoy the privileges, exemptions, and immunities conferred by" the IOIA. EO 10,680, 21 Fed. Reg. 7647 (1956).

b. Petitioners are residents of India who live near the Tata Mundra Power Plant in Gujarat. Pet. App. 2a. The IFC provided a loan of $450 million to the owner of the plant for its construction and operation. *Id.* at 3a. In accordance with IFC policy, the loan agreement contained provisions designed to protect local communities, requiring the loan recipient to manage environmental and social risks posed by the financed project. *Id.* at 3a, 25a. The IFC retained supervisory authority over the plant owner's compliance with the environmental and social risks provisions and could revoke financial support for noncompliance. *Id.* at 3a. According to an audit conducted by the IFC's ombudsman, the owner of the plant did not comply with the environmental and social risks provisions; the IFC, however, did not revoke the plant's financing. *Ibid.*

Petitioners sued the IFC, asserting claims that "are almost entirely based on tort," but raising one claim as alleged third-party beneficiaries of the environmental and social risks provisions of the loan agreement. Pet. App. 3a. The district court dismissed petitioners' suit, concluding that it was barred by the court of appeals' decision in *Atkinson* v. *Inter-American Development Bank*, 156 F.3d 1335 (D.C. Cir. 1998). Pet. App. 29a-30a, 37a-38a.[1]

In *Atkinson*, the court of appeals held that, in providing international organizations with the "same immunity * * * as is enjoyed by foreign governments,"

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[1] The district court further determined that article VI, § 3 of the Articles of Agreement did not waive the IFC's immunity from suit, under the standards the court of appeals adopted in *Mendaro* v. *World Bank*, 717 F.2d 610 (D.C. Cir. 1983). Pet. App. 30a-37a.

22 U.S.C. 288a(b), Congress intended to adopt foreign sovereign immunity law "only as it existed in 1945—when immunity of foreign sovereigns was absolute." 156 F.3d at 1341. The court reasoned that the statutory text lacked "a clear instruction as to whether Congress meant to incorporate into the IOIA subsequent changes to the law of immunity of foreign sovereigns." *Ibid.* But it believed that by authorizing the President to modify a designated organization's immunities for abuse or other reasons under 22 U.S.C. 288, Congress "delegate[d] to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances." *Atkinson*, 156 F.3d at 1341. The court also found telling a statement in the Senate Report explaining that the President could restrict an international organization's immunity if it engaged in "activities of a commercial nature." *Ibid.* (quoting S. Rep. No. 861, 79th Cong., 1st Sess., 2 (1945) (Senate Report)).

Noting that it was bound by *Atkinson*'s interpretation, the court of appeals in this case affirmed the district court's dismissal of petitioners' suit. Pet. App. 4a-7a.[2] Judge Pillard concurred for the same reason, but wrote separately to express the view that *Atkinson* was wrongly decided. *Id.* at 12a-22a. Judge Pillard reasoned that "[w]hen a statute incorporates existing law by reference, the incorporation is generally treated as dynamic, not static," and incorporates changes to the incorporated body of law. *Id.* at 12a-13a. She concluded

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[2] The court of appeals also affirmed the district court's determination that the IFC had not waived its immunity under *Mendaro*, *supra*. Pet. App. 7a-11a. This Court declined to grant further review of that determination. See 138 S.Ct. 2026 (2018) (granting certiorari "limited to Question 1"); Pet. i.

that *Atkinson* was mistaken in relying on the President's ability under the IOIA to restrict international organizations' immunity, because, in her view, that authority is "organization- and function-specific" and does not authorize the President generally to modify the applicable standard. *Id.* at 13a-14a. And she noted that Congress had considered and rejected a provision that would have expressly granted absolute immunity to international organizations. *Id.* at 14a-15a (discussing H.R. 4489, 79th Cong., 1st Sess. § 2(b)). Judge Pillard further explained that *Atkinson*'s static interpretation conflicted with the "considered view" of the State Department that international organizations are subject to suit for commercial activities by virtue of the FSIA's enactment. *Id.* at 15a. Finally, Judge Pillard stated that it made no sense to permit commercial suits against a foreign state acting alone, but not when states act in concert through an international organization. *Id.* at 16a.

SUMMARY OF ARGUMENT

Section 288a(b) of the IOIA affords designated international organizations the same jurisdictional immunity as is currently enjoyed by foreign states, not as was enjoyed in 1945.

A. The text, structure, and history of the IOIA support this interpretation. Congress's use of the present-tense phrase—"as is enjoyed"—is most naturally read to refer to the immunity afforded to foreign sovereigns when the statute is applied, not some 70 years in the past. If Congress had intended a backward-looking inquiry, it could have stated that international organizations shall be afforded the same immunity "as was enjoyed on the Act's effective date" or something similar. Congress's decision not to use such language is telling, particularly in light of the background principle that

statutory references to other bodies of law generally incorporate subsequent amendments to the referenced body of law.

This interpretation of Section 288a(b) is further supported by the structure of the IOIA. While Congress defined some protections for international organizations by reference to the protections afforded foreign governments, it defined others under a specific substantive standard. That suggests that, if Congress had intended to adopt a particular standard for international organizations' immunity from suit, it would have done so expressly—particularly given that, at the time, international consensus was trending towards the restrictive theory and the State Department itself had declined to recognize immunity in suits involving foreign state-owned vessels engaged in commercial activities.

Finally, the history of the IOIA also supports affording international organizations the same jurisdictional immunity as is afforded foreign states at the time of suit. As originally passed by the House of Representatives, Section 288a(b) expressly afforded international organizations absolute immunity from suit. But the Senate stripped the grant of absolute immunity and replaced it with the current language. This Court ordinarily assumes that Congress did not intend *sub silentio* to enact statutory language that it earlier discarded.

B. The conduct of the Executive Branch under the IOIA and subsequent congressional enactments further support this interpretation.

The process for affording privileges and immunities to international organizations typically proceeds in three parts: (1) the Executive Branch enters into an agreement to form an international organization; (2) Congress authorizes the United States' participation; and (3) the

President issues an Executive Order designating the organization as entitled to the privileges and immunities afforded by the IOIA. But when agreements require the United States to afford the organization absolute immunity from suit (and the agreement is not a self-executing treaty), Congress has provided for such immunity by separate legislation. If the court of appeals were correct that the IOIA grants international organizations absolute immunity from suit, such legislation would be redundant.

Moreover, in those and other circumstances, the State Department has made clear its view that the jurisdictional immunity afforded by the IOIA tracks the immunity afforded to foreign governments under the FSIA. This longstanding interpretation—evinced by actions of both political Branches—deserves deference.

C. Adopting the court of appeals' interpretation of Section 288a(b) would present practical difficulties. First, courts would have to decide whether the provision incorporates the *substantive* rules of foreign sovereign immunity applicable in 1945 or the *procedural* ones. The court of appeals and respondent have both assumed that Section 288a(b) incorporates only the then-existing substantive standards, but neither explains why that would be so. And even if only the substantive standards were incorporated, there could remain some uncertainty in determining the contours. Although the State Department afforded virtually absolute immunity from suit to foreign governments in 1945, there was some uncertainty regarding the immunity of state-owned merchant vessels and companies engaged in commercial activity. Under the court of appeals' view, courts would have to determine any disputed metes and bounds of

foreign sovereign immunity, as they existed in the policies of the State Department and in federal courts some 70 years in the past—and perhaps in circumstances that neither ever faced or that did not closely fit the situation of a particular international organization.

Respondent raises policy concerns about an interpretation of Section 288a(b) under which an international organization's immunity would conform to that of a foreign state at the time of suit. Those concerns are misplaced and cannot justify disregarding the plain text of the statute. In any event, the legislative history of the IOIA is replete with statements reflecting a commitment to put international organizations' immunity on par with that afforded to foreign sovereigns. That the IOIA leaves respondent subject to suit in similar circumstances as foreign governments today is consistent with Congress's judgment in Section 288a(b).

ARGUMENT

THE INTERNATIONAL ORGANIZATIONS IMMUNITIES ACT AFFORDS DESIGNATED INTERNATIONAL ORGANIZATIONS THE SAME JURISDICTIONAL IMMUNITY AS IS CURRENTLY ENJOYED BY FOREIGN STATES

The IOIA provides that international organizations "enjoy the same immunity from suit * * * as is enjoyed by foreign governments." 22 U.S.C. 288a(b). The text, structure, and history of the Act, as well as Executive Branch practice and related congressional enactments, all confirm that the jurisdictional immunity afforded by the Act is the jurisdictional immunity currently enjoyed by foreign states and as it might be modified over time, not as it existed when the Act was enacted in 1945. The court of appeals' contrary determination is incorrect, would present practical difficulties for federal courts,

and is not justified by the policy concerns that respondents invoke.

A. The Text, Structure, And History Of The IOIA Support Application Of The Same Immunity Enjoyed By Foreign States To International Organizations

1. In construing Section 288a(b), this Court should "begin, as always, with the text of the statute." *Permanent Mission of India to the U.N.* v. *City of N.Y.*, 551 U.S. 193, 197 (2007). Section 288a(b) provides simply that "[i]nternational organizations * * * shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. 288a(b). On its face, the plain text of this provision strongly suggests that the Act affords international organizations the immunity that is enjoyed by foreign governments today, not the immunity enjoyed by foreign governments in 1945.

a. To begin, Congress's use of the present tense—"as is enjoyed"—supports that interpretation. This Court has "frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach." *Carr* v. *United States*, 560 U.S. 438, 448 (2010); see, *e.g.*, *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 478 (2003) ("[T]he plain text of this provision, because it is expressed in the present tense, requires that instrumentality status [under the FSIA] be determined at the time suit is filed."); *United States* v. *Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."); *Barrett* v. *United States*, 423 U.S. 212, 216 (1976) (reasoning that Congress's use of the present perfect tense denoted "an act that has been completed" by the time of the offense "without ambiguity"). Here, because Section 288a employs the present tense to make the comparison to foreign sovereign

immunity, the statute is most naturally read to refer to the immunity granted to foreign sovereigns at the time that the statute is applied, not some 70 years in the past. "Congress could have phrased its requirement in language that looked to the past"—here, by referring to a foreign government's immunity on the IOIA's enactment date—"but it did not choose this readily available option." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987). "[R]espect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of [the Court's] own." *Murphy* v. *Smith*, 138 S. Ct. 784, 788 (2018).

b. Congress's choice of words is particularly instructive here, in light of background principles of statutory interpretation for references of this sort. As one prominent treatise explains, "[w]hen a statute adopts the general law on a given subject, the reference is construed to mean that the law is as it reads thereafter at any given time including amendments subsequent to the time of adoption." 2B Norman J. Singer, et al., *Sutherland Statutes & Statutory Construction* § 51:7 (7th ed. rev. 2012) (citation omitted); see, *e.g.*, *El Encanto, Inc.* v. *Hatch Chile Co.*, 825 F.3d 1161, 1164 (10th Cir. 2016); *United States* v. *Rodriguez-Rodriguez*, 863 F.2d 830, 831 (11th Cir. 1989); cf. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 7, at 90 (2012) ("A legal text referring to a statutorily defined term is understood to have a silent gloss, 'as the definition may be amended from time to time.'").

This proposition well pre-dates the IOIA's enactment. See 2 J.G. Sutherland, *Sutherland Statutes & Statutory Construction* § 405, at 789 (John Lewis ed. 1904) (citing, *e.g.*, *Culver* v. *People*, 43 N.E. 812, 814 (Ill.

1896)). And it reaffirms the most natural reading of the text. See *Gaston* v. *Lamkin*, 21 S.W. 1100, 1103 (Mo. 1893) (describing the typical statute to which this principle applies as one that refers "generally to the established law, by some such expression as 'the same as is provided for by law' in given cases") (citation omitted).

2. This interpretation of Section 288a(b) is further supported by the structure of the IOIA. See *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

While Congress defined some privileges and immunities of international organizations and their officers and employees by reference to the immunity of foreign governments, it defined other privileges and immunities under a specific substantive standard. *Compare* 22 U.S.C. 288a(b) and (d), 288d, *with* 22 U.S.C. 288a(c), 288c, and 288d(b); see pp. 2-4, *supra*. This distinction suggests that, if Congress had intended to adopt a particular fixed standard for international organizations' immunity from suit, it would have done so expressly. See *Sebelius* v. *Cloer*, 133 S. Ct. 1886, 1894 (2013) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).

That is especially so here, given that in the international community at the time of the IOIA's enactment, there were "two conflicting concepts of sovereign immunity, each widely held and firmly established." *Tate Letter*, 425 U.S. at 711. Although the State Department

still subscribed to the absolute theory of immunity in 1945, international consensus had been trending towards the restrictive theory. *Id.* at 712-713. And, when the State Department formally adopted the restrictive theory just seven years later, it explained that it had been considering the change "for some time." *Id.* at 711; pp. 4-6, *supra*; see *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 669 (1979) ("[C]ourts, in construing a statute, may with propriety recur to the history of the times when it was passed * * * to ascertain the reason as well as the meaning of particular provisions in it.") (citation omitted).

In fact, in suits filed not directly against foreign sovereigns, but instead in *in rem* suits against foreign state-owned merchant vessels, the State Department by 1945 had declined to recognize immunity. *The Pesaro*, for example, was an admiralty suit brought against an Italian state-owned vessel operated by employees of a government ministry "engaged in commercial trade carrying passengers and goods for hire." 277 F. 473, 473-474 (S.D.N.Y. 1921). The State Department informed the court that "government-owned merchant vessels" or privately owned vessels requisitioned by foreign states and "employed in commerce" are not "entitled to the immunities accorded public vessels of war." *Id.* at 479 n.3;[3] see 2 Green Haywood Hackworth, *Digest of International Law* § 173, at 438-439 (1941) (reproducing letter from Fred K. Nielsen, Solicitor for Department of State, to Julian W. Mack, U.S. District Judge (Aug. 2, 1921)); see also *id.* at 423-465 (discussing

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[3] This Court subsequently recognized immunity for the vessel, however, despite the State Department's decision not to do so. See *Berizzi Bros. Co.* v. *Steamship Pesaro*, 271 U.S. 562, 574 (1926).

State Department practice between 1914 and 1938 concerning immunity of state-owned merchant vessels).

Then, just months before Congress enacted the IOIA, this Court deferred to the State Department's decision to refrain from suggesting immunity for a vessel that was owned by the Republic of Mexico, but in the possession of a private corporation that had contracted with Mexico to use the vessel for commercial purposes, with a share of the profits paid to Mexico. *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34 (1945). The State Department "certified that it recognize[d]" Mexico's ownership, but "refrained from certifying that it allow[ed] the immunity." *Id.* at 36. Relying heavily on the State Department's statement, the Court held that the suit could proceed. *Id.* at 38; see *ibid.* ("[I]t is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize.").[4]

When the State Department adopted the restrictive theory in 1952, it noted "the importance played by cases involving public vessels in the field of sovereign immunity." *Tate Letter*, 425 U.S. at 713; see, *e.g.*, *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (noting that "[a]lthough the narrow holding of *The Schooner Exchange* [v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812)] was only that the courts of the United States lack jurisdiction over an armed ship of a foreign state found in our port, that opinion came to be regarded as extending virtually absolute immunity to

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[4] The Court in *Hoffman* criticized the Court's failure in *Pesaro* to consider that "the political branch of the government" had declined to recognize immunity in that suit. 324 U.S. at 35 n.1.

foreign sovereigns"). In light of the State Department's own practice in such cases leading up to enactment of the IOIA, developments in foreign sovereign immunity law could be expected. Congress therefore would have had reason to directly enact a standard of absolute immunity for international organizations, if that is what it sought to afford regardless of any future developments in the law.

3. Finally, the drafting history of the IOIA also supports an interpretation of Section 288a(b) that ties an international organization's jurisdictional immunity to that accorded foreign states at the time of suit.

a. As originally passed by the House of Representatives, what is now Section 288a(b) expressly defined the immunity standard for international organizations. The bill provided: "International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy immunity from suit and every form of judicial process [unless waived]." H.R. 4489, 79th Cong. § 2(b) (passed by the House of Representatives, Nov. 20, 1945); see 91 Cong. Rec. 10,867 (1945). If the House's version had been enacted, there could be no question that such organizations would be entitled to absolute immunity from suit, regardless of any departure from such immunity for foreign governments. But, of course, that did not occur. Instead, the Senate amended Section 288a(b), stripping the grant of absolute immunity and replacing it with a reference to "the same immunity * * * as is enjoyed by foreign governments." H.R. 4489, 79th Cong. § 2(b) (passed by the Senate, Dec. 20, 1945); see 91 Cong. Rec. 12,432 (1945). The House accepted the Senate amendment without objection. 91 Cong. Rec. 12,532 (1945).

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442–443 (1987); accord *Chickasaw Nation* v. *United States*, 534 U.S. 84, 93 (2001). There is no sound basis for departing from that principle here.

b. Indeed, other aspects of the legislative history confirm the significance of that change. By contrast to Section 288a(b), the Senate left unchanged other provisions that expressly define certain privileges and immunities. *Compare* H.R. 4489, 79th Cong. §§ 2(c), 3, 6, and 7(b) (passed by the House, Nov. 20 1945), *with* IOIA §§ 2(c), 3, 6, and 7(b), 59 Stat. 669, 671, 672; see Pet. App. 14a-15a (Pillard, J., concurring) (noting comparison). The Senate Report explained that, "[i]n general," the amended bill would provide "privileges and immunities * * * similar to those granted by the United States to foreign governments and their officials," except that, in some circumstances, it would confer "somewhat more limited" protections. Senate Report 3. The examples of the more limited privileges and immunities identified by the Senate Report are those for which Congress expressly identified the applicable standard. *Ibid.*

The Senate Report thus reflects Congress's intent that international organizations' immunity track the immunity of foreign states, except where Congress specified a lower standard. See also 91 Cong. Rec. at 12,531 (explaining that "all of th[e Senate's] amendments limited provisions that were unanimously passed by the House"). Nothing in the legislative history suggests that Congress intended for international organizations to have

greater immunity than that enjoyed by foreign states, as would be the case under the court of appeals' view.

4. Despite the text, structure, and history of Section 288a(b), the court of appeals reiterated its conclusion from *Atkinson* v. *Inter-American Development Bank*, 156 F.3d 1335 (1998), that Section 288a grants international organizations "complete immunity" from suit, "unless it is waived or the President intervene[s]." Pet. App. 6a. For that conclusion, the *Atkinson* court relied on two observations, neither of which supports its interpretation of Section 288a(b). See 156 F.3d at 1341.

a. First, the *Atkinson* court reasoned that, in authorizing the President to "modify, condition, limit, and even revoke" what the court believed was "the otherwise absolute immunity of a designated organization," Congress created "an explicit mechanism for monitoring the immunities of designated international organizations." 156 F.3d at 1341 (citing 22 U.S.C. 288). According to the court, Congress's choice "to delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances" is incompatible with the view that Congress intended international organizations' immunity to track developments in foreign sovereign immunity. *Ibid.* The court of appeals erred.

The IOIA authorizes the President to restrict the immunities provided to international organizations in two ways: (1) it gives the President authority to "revoke the designation of any international organization" if the President determines that the international organization has "abuse[d]" the privileges, exemptions, or immunities conferred by the IOIA or "for any other reason"; and (2) it permits the President "to withhold or withdraw from any [international] organization or its

officers or employees any of the privileges, exemptions, and immunities provided for" by the IOIA, or to "condition or limit" such protections, "in the light of the functions performed by any such international organization." 22 U.S.C. 288.

The statutory authority to revoke a specific organization's status for abuse or other reason does not address the immunity standard applicable to international organizations generally. And the authority to modify the immunities afforded to "any such organizations or its officers or employees," "in light of the functions performed by any such organization," is not inconsistent with the prospect that the immunity afforded international organizations, as a class, may be altered through other means. As Judge Pillard observed (Pet. App. 13a), the President's authority under Section 288 is most naturally read as focusing on the need for discretion to adjust a *specific* organization's immunity, if the extension of the full immunities provided by the statute would be inappropriate in light of the *specific* purposes of the organization. Indeed, that is how the President has exercised his Section 288 authority in the past.[5] But assuming that Section 288 would also permit the President to modify certain immunities afforded to international organizations on a more categorical basis, the provision's focus on the functions performed and immunities enjoyed by specific organizations does not suggest that Section 288 was intended to exclude all other

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[5] See, *e.g.*, EO 12,425, 48 Fed. Reg. 28,069 (1983) (recognizing the International Criminal Police Organization as an international organization under the IOIA, but limiting the privileges and immunities conferred by that designation); EO 11,718, 38 Fed. Reg. 12,797 (1973) (same for the International Telecommunications Satellite Organization).

means—including future legislation—of broadly altering the immunity principles applicable to foreign governments and therefore to international organizations generally.

b. Second, the *Atkinson* court found support for its reading of Section 288a(b) in a passage from the Senate Report observing that the authority given to the President in Section 288 would permit "the adjustment or limitation of the privileges in the event that any international organization should engage, for example, in activities of a commercial nature." 156 F.3d at 1341 (quoting Senate Report 2). In the court's view, that reference indicated that the "concerns that motivated the State Department to adopt the restrictive immunity approach" in the *Tate Letter* "(and Congress to codify those principles in the FSIA in 1976) were apparently taken into account by the 1945 Congress." *Ibid.*

The court's reading of the legislative history, however, is mistaken. The Senate Report was responding to a concern that particular organizations might abuse the immunities provided by the bill. As Representative Robertson explained, the amendment ensured that, "if some organization starts functioning here and goes beyond the scope for which it was created, let us say [it] starts into business over here," Section 288 would allow the President to appropriately respond. 91 Cong. Rec. at 12,530; see *ibid.* (noting the "very hypothetical case" that a foreign representative to the United Nations "would open up a shipping business"); see also 91 Cong. Rec. at 12,432 (explaining that the Senate's amendments, including authorizing the President to withdraw immunities, were for the "purpose of safeguarding against the possibility of abuse of privilege"). The legislative history does not suggest that Section 288a was

intended to lock in the scope of immunity that organizations received as a general matter.

Moreover, even if Congress did expect Section 288 to provide the President a mechanism for adjusting the privileges and immunities of all international organizations in the event such organizations began to be formed with the purpose of participating in commercial activities, that would not support the court of appeals' interpretation of Section 288a(b). As discussed above, there is no indication from the text or legislative history that Congress intended Section 288 to provide the *sole* mechanism for addressing such developments. In any event, preventing foreign sovereigns from claiming immunity for commercial activities was not the only motivation for adopting the restrictive theory. See *Tate Letter*, 425 U.S. at 714 (noting that the restrictive theory was most consistent with the United States' "subjecting itself to suit in [U.S.] courts in both contract and tort"); 28 U.S.C. 1605(a)(1)-(6) (providing exceptions to jurisdictional immunity unrelated to commercial activities, *e.g.*, for certain domestic torts).

B. The Conduct Of The Political Branches Following Enactment Of The IOIA Supports Affording International Organizations The Jurisdictional Immunity Currently Enjoyed By Foreign Sovereigns

The conduct of the Executive Branch under the IOIA and subsequent congressional enactments further support the view that the standard set out in Section 288a(b) follows changes in foreign sovereign immunity law. See *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 385-386 (2000) (while this Court "do[es] not unquestioningly defer to the legal judgments expressed in Executive Branch statements when" inter-

preting a federal statute, it has "consistently acknowledged that the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court'") (citation omitted).

1. The cooperative process followed by the Executive Branch and Congress in recognizing immunity for international organizations demonstrates that the political Branches have long followed this interpretation of the immunities afforded by Section 288a(b). The privileges and immunities in the IOIA are typically provided to international organizations through a three-part process. The Executive Branch enters into an agreement with one or more foreign governments to form an international organization. See, *e.g.*, Articles of Agreement of the International Development Association, *entered into force*, Sept. 24, 1960, 11 U.S.T. 2284, T.I.A.S. No. 4607. Congress (or the Senate through its consent to a treaty) authorizes participation by the United States in the international organization. See, *e.g.*, 22 U.S.C. 284 (authorizing the President "to accept membership" in the International Development Association). And the President issues an Executive Order recognizing the organization as an international organization within the meaning of the IOIA, entitled to the protections that Act affords. See, *e.g.*, EO 11,966, 42 Fed. Reg. 4331 (1977) (designating the International Development Association as a "public international organization entitled to enjoy the privileges, exemptions, and immunities conferred by the [IOIA]").

Some agreements creating international organizations, however, require the member states to afford the organization specific immunities beyond those expressly provided by the IOIA. The agreement establishing

the World Trade Organization (WTO), for example, requires member states to afford it absolute immunity from suit in their courts, unless waived by the WTO. See Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), art. VIII(4), *entered into force* Jan. 1, 1995, 1867 U.N.T.S. 154 (requiring members to provide the privileges and immunities provided by the Convention on the Privileges and Immunities of the Specialized Agencies (Specialized Agencies Convention), *entered into force* Dec. 2, 1948, 33 U.N.T.S. 261); Specialized Agencies Convention, art. III, § 4 (affording UN specialized agencies "immunity from every form of legal process," unless waived).

For such organizations, mere designation under the IOIA would not fulfill the United States' international commitment precisely because the IOIA does not confer absolute immunity from suit. In those circumstances, where the agreement was not a self-executing treaty,[6] Congress has either (1) authorized the President to implement the immunity provisions in the applicable agreement, see, *e.g.*, 19 U.S.C. 3511(b) (authorizing the President to implement the WTO Agreement's immunity provisions); or (2) provided such immunity by separate legislation, see, *e.g.*, 22 U.S.C. 286h (giving "full force and effect in the United States" to immunity provisions of the Articles of Agreement of the IMF, *entered into force* Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39).[7]

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[6] A self-executing treaty is equivalent to an Act of Congress and requires no legislation to make its provisions enforceable. See *Medellin* v. *Texas*, 552 U.S. 491, 505 (2008).

[7] Notably, the IFC Act gives "full force and effect in the United States," 22 U.S.C. 282g, to the section of the IFC's Articles of Agreement establishing the "position of the corporation with regard to judicial process," art. VI, § 3 (capitalization altered). But unlike

Such legislation ensures that, notwithstanding the United States' adoption of the restrictive theory or any future developments in foreign sovereign immunity, the United States fulfills its obligations to the international organization. But, under the court of appeals' interpretation of Section 288a, such legislation would be redundant.

2. The provision of privileges and immunities for the Organization of American States (OAS) is similarly instructive. The OAS was formed in 1951 in its current structure through a multilateral treaty that provided that the organization would enjoy "such legal capacity, privileges and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes." Charter of the Organization of American States, art. 103, *entered into force*, Dec. 13, 1951, 2 U.S.T. 2394, T.I.A.S. No. 2361. After the Charter was ratified by the United States, the President designated the OAS as an international organization "entitled to enjoy the privileges, exemptions, and immunities conferred by the [IOIA]." EO 10,533, 19 Fed. Reg. 3289 (1954).

Forty years later, the United States agreed to afford the OAS more extensive immunity. In 1994, the Senate gave its advice and consent to the ratification of the Headquarters Agreement Between the Government of the United States of America and the Organization of American States, *signed at Washington* May 14, 1992, S. Treaty Doc. No. 40, 102d Cong., 2d Sess. (1992);

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the agreement creating the IMF, the IFC's Articles of Agreement do not require absolute immunity from suit. *Compare* IMF Articles of Agreement, art. IX, § 3 (stating that the IMF shall "enjoy immunity from every form of judicial process," unless waived), *with* IFC Articles of Agreement, art. VI, § 3 (stating that "[a]ctions may be brought against the Corporation" in courts of member states in which the IFC has a specified connection).

140 Cong. Rec. 28,361 (1994). In contrast to the OAS Charter, the Headquarters Agreement provides the OAS with absolute immunity from suit. See art. IV, § 1 ("The Organization shall enjoy immunity from suit and every form of judicial process [absent waiver].").

Because the Headquarters Agreement was self-executing, see S. Treaty Doc. No. 40, at III, no Act of Congress was needed to afford the OAS the absolute immunity it now required. But in submitting the Headquarters Agreement to the President, the State Department made clear that by affording the OAS "full immunity from judicial process," the agreement went "beyond the usual United States practice of affording restrictive immunity," "[i]n exchange" for requiring the organization to "'make provision for appropriate modes of settlement of those disputes for which jurisdiction would exist against a foreign government under the Foreign Sovereign Immunities Act.'" *Id.* at VI.

3. Indeed, the State Department has repeatedly expressed the same view about the scope of jurisdictional immunity afforded to international organizations under the IOIA since the United States' adoption of the restrictive theory of foreign sovereign immunity. See Letter from Roberts B. Owen, Legal Adviser, to Leroy D. Clark, Gen. Counsel, Equal Emp't Opportunity Comm'n 2 (June 24, 1980) ("By virtue of the FSIA, and unless otherwise specified in their constitutive agreements, international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities, while retaining immunity for their acts of a public character."); Letter from Detlev F. Vagts, Office of the Legal Adviser, to Robert M. Carswell, Jr., OAS 2 (Mar. 24, 1977) (*Vagts Letter*) (stating that the IOIA

"links" the jurisdictional immunity of international organizations and that of foreign sovereigns), available at D. Ct. Doc. No. 22-7, at 41-42 (Sept. 18, 2015); Pet. Br. 8-9 (collecting additional Executive Branch statements).[8]

This longstanding interpretation—evinced by actions of both political Branches—of the privileges and immunities afforded by the IOIA in order to fulfill the United States' international obligations deserves deference.

C. The Court of Appeals' View Of International Organization Immunity Would Present Practical Problems And Is Not Required By Respondent's Policy Concerns

Adopting the court of appeals' view of the jurisdictional immunities afforded international organizations under Section 288a(b) would present practical difficulties and is not justified by the policy concerns asserted by respondent.

1. As an initial matter, if Section 288a(b) were interpreted to incorporate the law of foreign sovereign immunity as it existed in 1945, courts would then need to decide whether Congress intended to incorporate the substantive rules of foreign sovereign immunity applicable in 1945 or the procedural ones. As noted above, in 1945, federal courts followed a "two-step procedure" for determining the immunity of a foreign state from a particular suit. *Samantar* v. *Yousuf*, 560 U.S. 305, 311 (2010). The foreign state first could ask the State Department for a "suggestion of immunity." *Ibid.* (citation

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[8] In a 2006 brief filed in the Second Circuit, the United States cited *Atkinson* for the proposition that the IOIA provides absolute immunity. U.S. Amicus Br. at 17 n.*, *EM Ltd.* v. *Republic of Argentina*, No. 06-403. The government's brief did not contain any independent analysis of Section 288a or the Executive Branch's historical practice under the IOIA, and does not reflect the United States' longstanding interpretation of the provision.

omitted). If the State Department obliged, "the district court surrendered its jurisdiction." *Ibid.* Otherwise, the court would generally "decide for itself whether all the requisites for such immunity existed," applying the "established policy" of the State Department. *Id.* at 311-312 (citation omitted).

The court of appeals and respondent have both assumed that, if Section 288a(b) incorporates foreign sovereign immunity law as it existed in 1945, it incorporates only the *substantive* standards—the then-"established policy," *Samantar*, 560 U.S. at 312, of the State Department—not the two-step procedure. See *Atkinson*, 156 F.3d at 1341; Br. in Opp. 14. But neither the court nor respondent explains why that would be so. See *Vagts Letter* 1 (indicating that the State Department initially filed suggestions of immunity for international organizations following the enactment of the IOIA).

Moreover, even if the static view of Section 288a(b) would incorporate only the substantive standards that prevailed in 1945, there could remain some uncertainty in determining the contours. Section 288a(b) affords "international organizations, their property and their assets * * * the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. 288a. Although the State Department generally afforded "virtually absolute immunity" from suit to foreign governments in 1945, *Verlinden*, 461 U.S. at 486, there was some uncertainty regarding the immunity of state-owned merchant vessels. *Compare The Pesaro*, 277 F. at 479 n.3 (noting the State Department's view that no immunity should be provided "government-owned merchant vessels * * * employed in commerce"), with *Berizzi Bros. Co.* v. *Steamship Pesaro*, 271 U.S. 562, 570 (1926) (affording immunity to the

same ship, despite the State Department's views); cf. *Hoffman*, 324 U.S. at 35 n.1 (criticizing without expressly overruling *Berizzi Bros.*). And the State Department had also expressed the view that "agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoyed no privileges or immunities not appertaining to other foreign corporations, agencies, or individuals doing business here." *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 200 (S.D.N.Y. 1929).

Under the court of appeals' view, courts would therefore have to determine any disputed metes and bounds of foreign sovereign immunity, as they existed in the policies of the State Department and in federal courts some 70 years in the past—and perhaps in circumstances that neither ever faced or that did not closely fit the situation of a particular international organization. Cf. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 699 (2004) (refusing to adopt an interpretation of the FSIA that would require courts, in some cases, "to follow the same ambiguous and politically charged standards that the FSIA replaced") (internal quotation marks and citation omitted).

2. In their response to the certiorari petition, respondent raised policy concerns about an interpretation of Section 288a(b) under which an international organization's immunity would conform to that of a foreign state at the time of suit. "The role of this Court," however, "is to apply the statute as it is written," regardless whether it thinks "some other approach might 'accor[d] with good policy.'" *Burrage* v. *United States*, 571 U.S. 204, 218 (2014) (citation omitted; brackets in original). In any event, respondent's concerns are misplaced.

a. Respondent contends that such an interpretation would be "inconsistent with the principles animating international-organization immunity," which, respondent suggests, include that an individual member "'ought not be able to exercise power, through its national courts, over the execution of the Organization's functions'" that are "'determined * * * collectively.'" Br. in Opp. 22 (citation omitted). But when member states determine that the functions of an international organization require a particular level of immunity, they are free to specify as much in the agreement establishing the organization—and they have done so. See pp. 25-28, *supra*; see also, *e.g.*, Agreement Establishing the Asian Development Bank, art. 50, *entered into force* Aug. 22, 1996, 17 U.S.T. 1418, T.I.A.S. No. 6103 (providing Asian Development Bank "immunity from every form of legal process, except in cases arising out of or in connexion with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities"); 22 U.S.C. 285g (giving "full force and effect" to Article 50 "in the United States"). The scope of the immunity afforded by the IOIA will have no effect on the United States' fulfillment of these international obligations. See *Bzrak* v. *United Nations*, 597 F.3d 107, 112 (2d Cir.) (declining to determine the scope of immunity afforded the United Nations under the IOIA, because the Convention on Privileges and Immunities of the United Nations, *entered into force* Apr. 29, 1970, 21 U.S.T. 1418, T.I.A.S. No. 6900, directly granted the UN absolute immunity), cert. denied, 562 U.S. 948 (2010).

b. Respondent also expresses concern (Br. in Opp. 22) that, under the restrictive theory of immunity,

"nearly all of the[] activities" of some international organizations might be subject to lawsuits in U.S. courts. But the FSIA's commercial-activity exception is not an authorization of just any commercial suit. Rather, it imposes a number of requirements including, for example, that the action be "based upon a commercial activity carried on *in the United States*," 28 U.S.C. 1605(a)(2) (emphasis added). This Court has construed that language to permit suit only when the "'particular conduct' that constitutes the 'gravamen' of the suit" is commercial activity occurring in the United States. *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 396 (2015) (citation omitted). When the gravamen of a complaint is conduct that was either not of a commercial nature or occurred abroad, the commercial-activity exception does not apply, even if the suit is otherwise related to the defendant's domestic commercial activities. *Id.* at 396-397. Incorporating the FSIA standard of immunity for international organizations is therefore unlikely to open the floodgates of litigation, even against international organizations, like the IFC, that "focus on financial transactions." Br. in Opp. 22.

Moreover, international organizations can further reduce their exposure to litigation in other ways by, for example, clarifying whether commercial agreements are intended to create third-party-beneficiary rights. Cf. Pet. App. 9a & n.4 (noting that petitioners raise a "third party beneficiary claim" based on environmental and social risks provisions in the loan agreement). Other defenses, such as *forum non conveniens*, may also be available. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981).

In any event, there is no indication that, when Congress enacted the IOIA, such policy concerns led it to

provide international organizations greater immunity from suit than that conferred on foreign states. To the contrary, the legislative history is replete with statements reflecting a commitment to put international organizations' immunity on par with that afforded to foreign sovereigns. See, *e.g.*, Senate Report 1 ("The basic purpose of this title is to confer upon international organizations * * * privileges and immunities of a governmental nature."); *id.* at 2 ("[I]n cases where th[e] Government associates itself with one or more foreign governments in an international organization, there exists at the present time no law * * * extend[ing] privileges of a governmental character."); *id.* at 4 (Section 288a extends to international organizations the privileges and immunities "accorded foreign governments under similar circumstances"). And Congress enacted text precisely crafted to that purpose. Foreign governments engaged in commercial activities within the United States are subject to suit in U.S. courts. 28 U.S.C. 1605(a)(2). That the IOIA leaves respondent also subject to suit in similar circumstances is consistent with Congress's judgment in Section 288a(b).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

BUDHA ISMAIL JAM, ET AL.,
Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE AFRICAN UNION, FOOD AND AGRICULTURE ORGANIZATION, AND GREAT LAKES FISHERY COMMISSION, ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 7

ARGUMENT 11

I. THE FOUNDING OF INTERNATIONAL ORGANIZATIONS WAS PREDICATED ON AN UNDERSTANDING OF UNIFORM ABSOLUTE IMMUNITY ACROSS MEMBER STATES 11

A. The immunities afforded to international organizations reflect agreements by the global community 11

B. The IOIA should not be construed to violate the commitments made by the United States 15

C. The IOIA's absolute immunity complements these treaty-based immunities 17

D. International organizations have relied on and consistently asserted their virtually absolute immunity under the IOIA 20

E. Exposing international organizations to suit through the commercial activity exception now would upend the international regime of immunity 22

II. APPLICATION OF A COMMERCIAL ACTIVITY EXCEPTION TO INTERNATIONAL ORGANIZATIONS' IMMUNITY FRUSTRATES INTERNATIONAL ORGANIZATIONS' ABILITY TO FULFILL THEIR PURPOSES AND THEIR MEMBER STATES' INTERESTS 26

A. Application of the FSIA commercial activity exception would frustrate international organizations' ability to fulfill their missions 29

1. Importing the commercial activity exception from the FSIA would divert valuable resources..... 29

2. The application of the commercial activity exception to international organizations' immunities would undermine their missions..... 31

B. Application of the commercial activity exception from the FSIA would impose a considerable burden on member states..... 33

III. INTERNATIONAL ORGANIZATIONS ALREADY HAVE GOVERNANCE AND REGULATION MECHANISMS 34

CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

Federal Statutes

International Organizations Immunities Act,
22 U.S.C. § 288 *et seq.* 1

22 U.S.C. § 288a(b) 20-21

22 U.S.C. § 288a(c) 30-31

Foreign Sovereign Immunities Act of 1976,
28 U.S.C. § 1601 *et seq.* 8

28 U.S.C. § 1603(d) 26

28 U.S.C. § 1605(a) 8, 26

Cases

Atkinson v. Inter-American Dev. Bank,
156 F.3d 1335 (D.C. Cir. 1998) ..... *passim*

Atl. Tele-Network Inc. v. Inter-Am. Dev. Bank,
251 F. Supp. 2d 126 (D.D.C. 2003) 32

Azima v. RAK Inv. Auth.,
305 F. Supp. 3d 149 (D.D.C. 2018),
appeal pending 27

Bisson v. United Nations,
No. 06 Civ. 6352(PAC)(AJP), 2007 WL
2154181 (S.D.N.Y. July 27, 2007) 12-13

Bro Tech Corp. v. European Bank for Reconstruction and Dev.,
No. CIV.A. 00–2160, 2000 WL 1751094
(E.D. Pa. Nov. 29, 2000) 32

Broadbent v. Org. of Am. States,
481 F. Supp. 907 (D.D.C. 1978)..... 14, 25

Chew Heong v. United States,
112 U.S. 536 (1884)..... 16-17

Donald v. Orfila,
788 F.2d 36 (D.C. Cir. 1986)..... 29

Hilaturas Miel, S.L. v. Republic of Iraq,
573 F. Supp. 2d 781 (S.D.N.Y. 2008) 27

In re Dinastia, L.P.,
381 B.R. 512 (S.D. Tex. 2007)..... 34

Int'l Refugee Org. v. Rep. S.S. Corp.,
189 F.2d 858 (4th Cir. 1951) 21-22

Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co.,
264 F. App'x 13 (D.C. Cir. 2008) 21, 29-30

Lutcher S.A. Celulose E Papel Condoi, Parana, Brazil v. Inter-Am. Dev. Bank, 253 F. Supp. 568 (D.D.C. 1966) 32-33

Mendaro v. World Bank, 717 F.2d 610 (D.C. Cir. 1983) ..... *passim*

Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804) 17

Nyambal v. Int'l Monetary Fund, 772 F.3d 277 (D.C. Cir. 2014) 29-30

Price v. Unisea, Inc., 289 P.3d 914 (Alaska 2012) 21

Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) 26

Sadikoglu v. U.N. Dev. Programme, No. 11 Civ. 0294(PKC), 2011 WL 4953994 (S.D.N.Y. Oct. 14, 2011) 29

Samantar v. Yousuf, 560 U.S. 305 (2010) 9, 18, 33

United States v. Chalmers, No. S5 05 CR 59(DC), 2007 WL 624063 (S.D.N.Y. Feb. 26, 2007) 30

Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480 (1983) 9, 18, 33

Other Authorities

141 Cong. Rec. H7630-31 (daily ed. July 25, 1995) 12

Agreement between the Swiss Federal Council and the World Intellectual Property Organization to determine the legal status in Switzerland of the Organization art. 5(1), Dec. 9, 1970 19

Agreement establishing the International Fund for Agricultural Development, June 13, 1976, 28 U.S.T. 8435 20

Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12 (Mar. 31) 16

Constitution of the World Health Organization, July 22, 1946 (as amended Sept. 15, 2005), 14 U.N.T.S. 185 ..... 6, 7, 22

Convention Establishing the World Intellectual Property Organization art. 12(3), July 14, 1967, 21 U.S.T. 1749 18-19

Convention on the Great Lakes Fisheries between the United States of America and Canada, Sept. 10, 1954 19-20

Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946 14

David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l L. 194, 199 (2005) 23

Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946) 2

Exec. Order No. 9751, 11 Fed. Reg. 7713 (July 11, 1946) 3

Exec. Order No. 10,025, 13 Fed. Reg. 9361 (Dec. 30, 1948) 6-7

Exec. Order No. 10,133, 15 Fed. Reg. 4159 (June 27, 1950) 4

Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962) 2-3, 4

Exec. Order No. 11,866, 40 Fed. Reg. 26,015 (June 18, 1975) 7

Exec. Order No. 12,567, 51 Fed. Reg. 35,495 (Oct. 2, 1986) 5

Exec. Order No. 12,628, 53 Fed. Reg. 7725 (Mar. 8, 1988) 5

Exec. Order No. 12,732, 55 Fed. Reg. 46,489 (Oct. 31, 1990) 3

Exec. Order No. 12,894, 59 Fed. Reg. 4237 (Jan. 26, 1994) 4

Exec. Order No. 13,377, 70 Fed. Reg. 20,263 (Apr. 13, 2005) 2

General Convention on the Privileges and Immunities of the Organization of African Unity, Oct. 25, 1965 20

Great Lakes Fishery Commission, *Budget*, http://www.glfc.org/budget.php 34

International Labour Organization, *Membership*, https://www.ilo.org/tribunal/membership/lang--en/index.htm 35

Joint Resolution, Ch. 469, 62 Stat. 441 (1948) 6

Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 Am. J. Int'l L. 828 (1947) 13

LaGrand Case (Ger. v. U.S.), Judgment, 2001 I.C.J. 466 (June 27) 16

Lawrence Preuss, *The International Organizations Immunities Act*, 40 Am. J. Int'l L. 332 (1946) 13, 24

OECD, *Who does what*, http://www.oecd.org/about/whodoeswhat/ 35

Organization of African Unity, Sirte Declaration, Fourth Extraordinary Session of the Assembly of Heads of State and Government, Sept. 9, 1999 12

UNIDO Indus. Dev. Org., Rep. on the Work of Its Forty-Fourth Session, GC.17/2 (2016) 35

Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11) 11

Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44 (Feb. 4) 15-16

U.N. Treaty Collection, *Chapter III: Privileges and Immunities, Diplomatic and Consular Relations, etc.*, https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iii-2&chapter=3&lang=en#2 19

U.N. Treaty Collection, *Convention on the Privileges and Immunities of the Specialized Agencies*, https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iii-2&chapter=3&lang=en 25

U.S. Department of State, *Vienna Convention on the Law of Treaties*, https://www.state.gov/s/l/treaty/faqs/70139.htm 15

Vienna Convention on the Law of Treaties, art. 27, 31(1), May 23, 1969, 1155 U.N.T.S. 331 15

World Bank Grp. v. Wallace, 2016 SCC 16 ¶ 93 (Can.) 25

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are twelve international organizations that operate around the world to provide medical treatment, combat hunger, conserve valuable natural resources, promote democracy, assist impoverished rural populations, secure financial stability, promote global innovation, and recommend policies aimed at promoting sustainable economic growth and improving the social well-being of countries and their citizens, among other missions to serve the public good across national boundaries. *Amici* submit this brief to highlight the broad and significant repercussions that limiting the immunities enjoyed by them and many other international organizations designated under the International Organizations Immunities Act ("IOIA"), 22 U.S.C. § 288 *et seq.*, would have on their ability to perform their vital tasks.

The missions of the *amici* cover a diverse range of subjects:

The African Union is a continental organization aimed at accelerating the process of

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[1] Pursuant to this Court's Rule 37.3(a), counsel for all parties consented in writing to the filing of this brief. Pursuant to this Court's Rule 37.6, *amici* hereby state that this brief was not authored in whole or in part by counsel for any party, and no such counsel or any party made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

integration on the African continent and addressing multi-faceted social, econor and political issues. It aims, among other things, to promote sustainable development, promote research in all fields but particularly in the areas of science and technology, work to eradicate preventable diseases, and promote good health on the continent. It was designated by President George W. Bush as an international organization under the IOIA in 2005. Exec. Order No. 13,377, 70 Fed. Reg. 20,263 (Apr. 13, 2005).

The Food and Agriculture Organization ("FAO") is a specialized agency of the United Nations that leads international efforts to defeat hunger. FAO collects, analyzes, and disseminates data that aids in development, and assists member countries in devising agricultural policy, drafting effective legislation, and supporting projects aimed at achieving rural development and hunger alleviation goals. It was designated by President Harry S. Truman as an international organization under the IOIA in 1946. Exec. Order No. 9698, 11 Fed. Reg. 1809 (Feb. 19, 1946).

The Great Lakes Fishery Commission ("GLFC") facilitates cooperation between the United States and Canada to protect and sustain the Great Lakes fishery. It promotes scientific research, controls the invasive sea lamprey, and facilitates cooperative fishery management among various state and federal agencies. It was designated by President John F. Kennedy as an international organization under the IOIA in 1962.

Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962).

The International Fund for Agricultural Development ("IFAD") is a specialized agency of the United Nations aimed at inclusive and sustainable rural transformation to assist poor rural people in overcoming poverty and achieving food security through remunerative, sustainable, and resilient livelihoods. It is tasked with the mandate to eradicate poverty and hunger by investing in impoverished rural individuals through financial and technical assistance to agriculture and rural development projects in developing member states. It was designated by President George H.W. Bush as an international organization under the IOIA in 1990. Exec. Order No. 12,732, 55 Fed. Reg. 46,489 (Oct. 31, 1990).

The International Monetary Fund ("IMF") works to foster global monetary cooperation, secure financial stability, facilitate international trade, promote high employment and sustainable economic growth, and reduce poverty around the world. It was designed by President Harry S. Truman as an international organization under the IOIA in 1946. Exec. Order No. 9751, 11 Fed. Reg. 7713 (July 11, 1946).

The International Pacific Halibut Commission facilitates cooperation between the United States and Canada to protect and manage the stocks of Pacific halibut fish. It promotes research, devises conservation policies, and operates fisheries to maintain adequate Pacific

halibut stocks and ensure the healthy development of a vital fish species. It was designated by President John F. Kennedy as an international organization under the IOIA in 1962. Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962).

The North Pacific Marine Science Organization ("PICES") promotes and coordinates marine scientific research in order to advance scientific knowledge of the North Pacific Ocean and of its living resources, including research with respect to the ocean environment and its interactions with land and atmosphere, its role in and response to global weather and climate change, its flora, fauna and ecosystems, its uses and resources, and impacts from human activities. It was designated by President William J. Clinton as an international organization under the IOIA in 1994. Exec. Order No. 12,894, 59 Fed. Reg. 4237 (Jan. 26, 1994).

The Organisation for Economic Cooperation and Development ("OECD") is an intergovernmental organization aimed at stimulating sustainable economic development. The OECD engages in the promotion of the highest sustainable economic growth, financial stability, and the improvement of the social well-being and the standard of living, assisting governments by providing evidence-based analysis. It was designated by President Harry S. Truman as an international organization under the IOIA in 1950.

Exec. Order No. 10,133, 15 Fed. Reg. 4159 (June 27, 1950).[2]

The Pacific Salmon Commission ("PSC") is an international decision-making organization, composed of four Commissioners (and four alternates) from the United States and Canada. The PSC manages—through research and regular meetings between national, provincial/state, First Nation, and U.S. tribal delegates—commercial, sport, and subsistence salmon fisheries in the United States and Canada. It is responsible for all salmon originating in the waters of one country which are subject to interception by the other, or which impact management of the other country's salmon, or which biologically affect the stocks of the other country. It was designated by President Ronald Reagan as an international organization under the IOIA in 1986. Exec. Order No. 12,567, 51 Fed. Reg. 35,495 (Oct. 2, 1986).

The United Nations Industrial Development Organization ("UNIDO") is a specialized agency of the United Nations tasked with furthering industrial development in developing countries and countries with economies in transition. UNIDO fulfills its mandate by designing and implementing projects in beneficiary countries, which includes offering technical services and mobilizing financial services to fund environmentally-conscious development projects, and providing analytical

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[2] Exec. Order No. 10,133 designated the Organisation for European Economic Cooperation, which ultimately became the OECD, as an international organization under the IOIA.

research and policy advisory services. It was designated by President Ronald Reagan as an international organization under the IOIA. Exec. Order No. 12,628, 53 Fed. Reg. 7725 (Mar. 8, 1988).

The World Health Organization ("WHO") is a specialized agency of the United Nations, composed of 194 Member States (including the United States of America). Its objective is the "attainment by all peoples of the highest possible level of health" Constitution of the World Health Organization (hereinafter "WHO Constitution") art. 1, July 22, 1946 (as amended Sept. 15, 2005), 14 U.N.T.S. 185. Since its establishment in 1946, WHO has acted as the directing and coordinating authority on international health work by, *inter alia*, working with countries and a wide range partners to prepare for, prevent, respond to, and recover from all hazards that create disease outbreaks, in particular through its "Health Emergencies Programme"; providing leadership on matters critical to health; promoting research on health; setting norms and standards; articulating ethical and evidence-based policy options; providing technical public health support to countries; and monitoring and assessing health trends. The United States of America decided to become a member of the WHO through a Congressional Joint Resolution approved on June 14, 1948. *See* Joint Resolution, Ch. 469, 62 Stat. 441 (1948). Accordingly, the United States of America deposited its instrument of acceptance with the UN Secretary-General on 21 June 1948. All States Parties to the WHO Constitution, including therefore the United States of America, have

agreed to the legally-binding requirement that the Organization "shall enjoy in the territory of each Member such privileges and immunities as may be necessary for the fulfilment of its objective and for the exercise of its functions." WHO Constitution art. 67(a). It was designated by President Harry S. Truman as an international organization under the IOIA in 1948. Exec. Order No. 10,025, 13 Fed. Reg. 9361 (Dec. 30, 1948).

The World Intellectual Property Organization ("WIPO") is a specialized agency of the United Nations that was established as a global forum for intellectual property services, policy, information, and cooperation. It administers international registration systems in the field of patent trademarks, industrial designs, and appellations of origins, provides policy recommendations for shaping international intellectual property rules, a dispute resolution mechanism for resolving intellectual property-related disagreements across borders, and technical infrastructure services and support. It was designated by President Gerald R. Ford as an international organization under the IOIA in 1975. Exec. Order No. 11,866, 40 Fed. Reg. 26,015 (June 18, 1975).

SUMMARY OF ARGUMENT

The IOIA was enacted in 1945, at the dawn of the post-World War II era in which the United States took the lead in helping to promote international economic and political cooperation, to rebuild a war-ravaged world, and attempt to ensure

that the war's devastation would not be repeated. Since then, the IOIA has been consistently and rightly interpreted to recognize international organizations' absolute immunity from suit in United States courts, subject only to the exceptions provided in their own governing treaties or other instruments, or determined by the President to be appropriate to their particular circumstances. Congress designed this immunity to provide international organizations with protection necessary to enable them to successfully and efficiently fulfill their missions of public interest with full independence. The petitioners' position that, more than seven decades after its enactment, this longstanding recognition of absolute immunity should be limited by application of the statutory exceptions to foreign state sovereign immunity in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C § 1601 *et seq.*, including the "commercial activity" exception of § 1605(a)(2), Pet'r's Br. at 2, 14-16, would dramatically alter the settled expectations of international organizations like *amici* and drastically interfere with their continued ability to carry out their missions, by requiring them to defend themselves against claims in United States courts.

Applying FSIA concepts to international organizations would also be radically at odds with their essential character. International organizations are *not* states, nor are they mere aggregations of states. Nor do they exercise sovereign powers like states. International organizations are separate and independent bodies created by multiple states to address regional or

global issues and provide a forum for cross-border collaboration amongst member states as well as non-member states or private actors. International organizations function as part of a collaborative, diplomatic effort among states that have created and empowered the organization to pursue a specific mission.

Because of their different character, the rationale for conferring absolute immunity on international organizations is fundamentally different than the reasoning behind immunity for foreign states. Although immunity was extended to foreign states as "a matter of grace and comity," *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010) (quoting *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983)), international organizations required immunity to ensure independence from their member states and the ability to effectively carry out their missions. Altering the immunities enjoyed by international organizations would upend the agreements struck by their members about what protections these international organizations receive in each member state in order to fulfill their purposes. Petitioners' interpretation of the IOIA would run counter to the United States' obligations under its treaties and other international agreements, and in some instances violate those obligations, contrary to the long-established principle that acts of Congress should be construed so as to avoid such violations.

In addition, to import FSIA exceptions to immunity into the IOIA would frustrate the ability of international organizations to carry out their

good work by opening the door to private litigation that would interfere with the discharge of their missions. Organizations would need to divert their limited resources from the financing of these good works to cover the considerable financial and administrative burdens associated with defending themselves from civil litigation in the United States, which would ultimately be collectively borne by member states, including the United States. Such concerns are true not for only the respondent International Finance Corporation ("IFC") and other similar international financial organizations, but for *all* international organizations, including *amici*, since claims would no longer be dismissed by United States courts on grounds of immunity but go forward into resource-intensive litigation.

The Court of Appeals decision avoids these detrimental consequences. It accords with United States jurisprudence, international law, and historical practice and expectations, and facilitates the vital work of international organizations around the world. It should be affirmed.

ARGUMENT

I. THE FOUNDING OF INTERNATIONAL ORGANIZATIONS WAS PREDICATED ON AN UNDERSTANDING OF UNIFORM ABSOLUTE IMMUNITY ACROSS MEMBER STATES

A. The immunities afforded to international organizations reflect agreements by the global community

International organizations are not like states. International organizations have no territory, and they do not have general competence. "Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the [United Nations] Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice." Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, at 180 (Apr. 11). The specific terms of the constituent documents of international organizations vary, but their common, essential characteristic is that they are products of multilateral international agreement among states.

The absolute immunity of international organizations from suit or other legal process in the member states in which they operate has been a basic principle of international organizations since their creation in the aftermath of World War II.

The concept of international organizations grew out of an understanding among states in the international system that certain issues could not be addressed unilaterally, but required international cooperation. *See, e.g.*, 141 Cong. Rec. H7630-31 (daily ed. July 25, 1995) (statement of Rep. LaTourette) ("[I]f there is a problem in the Great Lakes in Canada, it becomes the problem of the Great Lakes in the United States. It was just such a crossing-all-borders problem that actually spurred the formation of [*amicus*] the Great Lakes Fishery Commission."); Organization of African Unity, Sirte Declaration, Fourth Extraordinary Session of the Assembly of Heads of State and Government, Sept. 9, 1999 ("[T]o rekindle the aspirations of our peoples for stronger unity, solidarity and cohesion in a larger community of peoples transcending cultural, ideological, ethnic, and national differences. . . . [and] effectively address the new social, political, and economic realities in Africa and in the world . . . ."); *Mendaro v. World Bank*, 717 F.2d 610, 619 (D.C. Cir. 1983) ("activities of international organizations are designed to resolve problems spanning national boundaries, with a benefit to be reaped collectively by the organizations' member nations. [They] thus owe their primary allegiance to the principles and policies established by their organic documents, and not to the evolving legislation of any one member."). International organizations act not only across borders, but often in areas and on issues where private actors have not acted and would not act because to do so would be unprofitable or too risky, or even prohibited. *See, e.g.*, *Bisson v. United Nations*, No. 06 Civ.

6352(PAC)(AJP), 2007 WL 2154181, at *3-8 (S.D.N.Y. July 27, 2007) (upholding immunity under IOIA for claims against the United Nations and World Food Programme for injuries suffered by World Food Programme employee in a bombing at United Nations headquarters in Iraq).

To fulfill their purposes, international organizations from the outset required a legal status sufficient to protect their independence, including from their own founding members. *See* Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 Am. J. Int'l L. 828, 847 (1947) ("Complete independence from the local authority . . . in order to enable [international organizations] to fulfill [their] international functions, constitutes the *raison d'etre*."). Because international organizations can only act within the territories of states, "[t]he only adequate method [to protect international organizations was] to grant [their] immunities in the basic international treaty, creating *identical and binding international obligations upon all Member States*." *Id.* at 848 (emphasis added). This independence includes immunity from suit in member states' courts. *See* Lawrence Preuss, *The International Organizations Immunities Act*, 40 Am. J. Int'l L. 332, 332 (1946) (purpose of the IOIA was to recognize "a legal status which is adequate to ensure the effective performance of [international organizations'] functions and the fulfillment of their purposes."). Immunity from legal process prevented a situation in which domestic courts could be used as proxies through which states could exert influence on an organization's activities, outside of the collective

governance mechanisms that were agreed to by all member states when establishing these organizations.

International organizations are, by definition, "creatures of treaty." *Broadbent v. Org. of Am. States*, 481 F. Supp. 907, 908 (D.D.C. 1978). And it is "by virtue of treaty [that international organizations] stand in a different position with respect to the issue of immunity than sovereign nations." *Id.* Whereas state immunity traditionally has been a matter of comity, the immunity of international organizations is a matter of multilateral international agreement. Many international organizations' governing documents—executed by the founding members, oftentimes including the United States—therefore set forth the scope of the privileges and immunities afforded to those organizations. In certain instances these privileges and immunities mirror the IOIA, while in other instances they include additional immunities or make explicit waiver of immunities to certain suits. These governing documents, and the scope of immunities they contain, represent a negotiated diplomatic and legally binding agreement between member states to abide by and respect the enumerated immunities. *See, e.g.*, Convention on the Privileges and Immunities of the United Nations art. 2(2), Feb. 13, 1946 ("The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of judicial legal process except insofar as in any particular case it has expressly waived its immunity.").

Whereas evolving practice in state immunity produced, over many decades, an accepted distinction between acts *jure imperii* and acts *jure gestionis*, there is no international acceptance of that distinction in the immunity of international organizations. Indeed, there could be no such distinction in the case of international organizations, which are not sovereigns.

B. The IOIA should not be construed to violate the commitments made by the United States

Because international organizations' founding and governing documents constitute treaties or other international agreements among the member states, specific provisions providing for the organization's immunity from suit and other legal process are binding commitments of the member states that must be performed in good faith, in accordance with the ordinary meaning of their terms and in light of their object and purpose. Vienna Convention on the Law of Treaties art. 26, 31(1), May 23, 1969, 1155 U.N.T.S. 331; U.S. Department of State, *Vienna Convention on the Law of Treaties*, https://www.state.gov/s/l/treaty/faqs/70139.htm. A member state cannot invoke the provisions of its domestic law as justification for its failure to perform a treaty. Vienna Convention on the Law of Treaties art. 27. *See* Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44, at ¶ 62 (Feb. 4) ("[A] state cannot adduce as against another State its Constitution

with a view to evading obligations incumbent upon it under international law or treaties in force."); *see also* Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, at ¶ 139 (March 31) ("The rights granted under the Vienna Convention are treaty rights which the United States has undertaken to comply with . . ."); LaGrand Case (Ger. v. U.S.), Judgment, 2001 I.C.J. 466 (June 27).

Even where an international organization's founding agreement does not provide for specific immunities, or where the United States has not consented as a party to a particular treaty enumerating these immunities, international organizations' immunities have been considered to constitute customary international law. *See Mendaro*, 717 F.2d at 615 ("One of the most important protections granted to international organizations is immunity from suits by employees of the organization in actions arising out of the employment relationship. Courts of several nationalities have traditionally recognized this immunity, and it is now an accepted doctrine of customary international law.").

Petitioners' position of incorporating the FSIA immunity exceptions into the text of the IOIA threatens to cast aside, in some cases, these international agreements and the obligations imposed on the member states, including the United States, as well as the relevant Executive Orders under the IOIA by which the United States has implemented those obligations. Such an interpretation of the IOIA should be avoided. *See*

Chew Heong v. United States, 112 U.S. 536, 549 (1884) ("[A]ny interpretation of [the act's] provisions would be rejected which imputes to congress an intention to disregard the plighted faith of the government, and, consequently, the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty."); *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"). By contrast, recognizing international organizations' absolute immunities as contemplated at the time when the IOIA was enacted harmonizes it with the treaties and agreements creating these organizations. That the United States agreed to provide absolute immunity in the founding treaties and agreements of certain international organizations created well after the FSIA entered into force demonstrates that the FSIA was not intended, and should not be interpreted, to limit the immunities of international organizations.

C. The IOIA's absolute immunity complements these treaty-based immunities

The IOIA's longstanding rule of absolute immunity applies as the critical default standard in the United States, where the international organization's founding agreement does not provide for specific immunities, or where the United States has not consented as a party to a particular treaty enumerating these immunities. Thus, in situations where the IOIA is the sole provision of immunities

for international organizations in the United States, it grants "virtually absolute immunity,"[3] which can only be limited by executive order or express waiver of this immunity by the international organization itself. *See Atkinson*, 156 F.3d at 1341.

For example, the WIPO Convention provides that the organization enjoys the immunities provided to the extent further agreed upon by the member state:

> The Organization may conclude bilateral or multilateral agreements with the other Member States with a view to the enjoyment by the Organization, its officials, and representatives of all Member States, of such privileges and immunities as may be necessary for the fulfilment of its objectives and for the exercise of its functions.

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[3] "[V]irtually absolute immunity" refers to the immunity that foreign sovereigns enjoyed at the time of the IOIA's enactment, which was only limited by waiver by the sovereign. *Samantar*, 560 U.S. at 311 (citing *Verlinden*, 461 U.S. at 486). Similarly, the IOIA's virtually absolute immunity confers absolute immunity from suit, subject only to waiver in the international organization's governing documents or international agreement, or where the President has explicitly limited immunity. *See Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1337, 1340 (D.C. Cir. 1998) (finding that the Inter-American Development Bank was entitled to "virtually absolute immunity" under the IOIA, limited only by situations in which international organizations waived their immunities or the President conditioned, limited, or revoked any such immunities); *see also* Resp't's Br. at 18-19.

Convention Establishing the World Intellectual Property Organization art. 12(3), July 14, 1967, 21 U.S.T. 1749.[4] In this respect, a Headquarters Agreement was concluded between WIPO and the Swiss Federal Council in 1970, which provides in particular that WIPO enjoys immunity "from criminal, civil and administrative jurisdiction, save in so far as such immunity has been formally waived by the Director General of the Organization." WIPO Swiss Headquarters Agreement art. 5(1).

But because the United States is not a signatory to the United Nations Convention on the Privileges and Immunities of the Specialized Agencies, Annex XV of which provides additional enumerated immunities for WIPO, the scope of WIPO's immunities in the United States depend upon the extent immunities are conferred by the IOIA. *See* U.N. Treaty Collection, *Chapter III: Privileges and Immunities, Diplomatic and Consular Relations, etc.*, https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iii-2&chapter=3&lang=en#2. *See also* Convention on the Great Lakes Fisheries between the United States of America and Canada, Sept. 10, 1954 (containing no provisions on

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[4] This provision encouraged additional agreements with member states to reflect the absolute immunity granted WIPO in the headquarters agreement concluded with its host state of Switzerland. *See* Agreement between the Swiss Federal Council and the World Intellectual Property Organization to determine the legal status in Switzerland of the Organization (hereinafter "WIPO Swiss Headquarters Agreement") art. 5(1), Dec. 9, 1970.

privileges and immunities); Agreement establishing the International Fund for Agricultural Development art. 2(a), June 13, 1976, 28 U.S.T. 8435 ("The Fund shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the exercise of its functions and for the fulfilment of its objective."); General Convention on the Privileges and Immunities of the Organization of African Unity (hereinafter "African Union Immunities Convention"), Oct. 25, 1965 (the United States is not a signatory to the Convention, but has designated the African Union as an international organization under the IOIA). The IOIA therefore serves as the backstop basis for international organization immunity in the absence of a governing treaty or international agreement (or where the relevant treaty is not self-executing), and the organizations that depend solely on the IOIA to define their immunities under U.S. law have relied in good faith on the absolute immunity recognized thereunder since their creation.

D. International organizations have relied on and consistently asserted their virtually absolute immunity under the IOIA

Since the IOIA was enacted in 1945, international organizations and courts in the United States have considered their immunity in the United States and abroad to be virtually absolute, subject only to consent to jurisdiction by express waiver in the international organizations' governing documents themselves, or explicit modifications by the Executive Branch. *See* 22

U.S.C. § 288a(b); *Atkinson*, 156 F.3d at 1339 ("The IOIA speaks in terms of 'immunity from suit and *every form of judicial process*,' language which admits of no exception . . . .") (citation omitted); *Price v. Unisea, Inc.*, 289 P.3d 914, 920 (Alaska 2012) ("Almost every court . . . has agreed that international organizations retain the absolute immunity granted when the IOIA was enacted in 1945.") (citing cases). Neither international organizations nor courts in the United States (with the exception of the Third Circuit) have understood an international organization's immunity to be subject to any type of commercial activity exception. *See, e.g., Inversora Murten, S.A.*, 264 F. App'x 13, at *2 (D.C. Cir. 2008) ("Because the immunity conferred upon international organizations by the IOIA is absolute, it does not contain an exception for commercial activity such as the one codified in the Foreign Sovereign Immunities Act of 1976 ('FSIA').").

Indeed, when sued in United States courts, international organizations have asserted—and the courts have agreed—that absolute immunity is essential to carrying out their missions around the world. *See Mendaro*, 717 F.2d at 615 (immunity of World Bank upheld because immunities are critical "to the growing efforts to achieve coordinated international action through multinational organizations with specific missions"); *Int'l Refugee Org. v. Rep. S.S. Corp.*, 189 F.2d 858, 861 (4th Cir. 1951) (advocating a liberal interpretation of the IOIA because "[t]he broad purpose of the [IOIA] was to vitalize the status of international organizations of which the United States is a

member and to facilitate their activities.") (quoting *Balfour, Guthrie & Co. v. United States*, 90 F. Supp. 831, 833 (N.D. Cal. 1950)). *See also, e.g.*, WHO Constitution art. 67(a) ("The Organization shall enjoy in the territory of each Member such privileges and immunities as may be necessary for the fulfilment of its objective and for the exercise of its functions."); African Union Immunities Convention ("CONSIDERING it necessary that the representatives of the Members of the Organization of African Unity and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions . . . ."). It would be radically inconsistent with the IOIA's history and purpose to change the absolute immunity of international organizations, and be radically at odds with the legitimate expectations of such organizations, which depend on the IOIA's protections where their governing documents do not themselves address their immunities or the immunities therein are not otherwise given effect in U.S. law.

E. Exposing international organizations to suit through the commercial activity exception now would upend the international regime of immunity

Petitioners' interpretation of the scope of immunity in the IOIA also threatens to fragment the international regime predicated on international organizations being immune from suit in every state in which they operate. It would be counterintuitive for this Court to unilaterally

determine, given the history of cooperation and reliance among international organizations and their constituent member states, that the previously-negotiated and collectively-understood immunities in international organizations' governing documents and the IOIA should now be transformed into an evolving standard, dependent not on multilateral founding documents achieved by consensus, but on the immunity exceptions of the FSIA as interpreted by U.S. courts. *See Atkinson*, 156 F.3d at 1341 (legislative history of IOIA suggests "that responsibility for modifying immunity granted by the IOIA rests with the President rather than with an evolving separate body of law"). Moreover, the FSIA represents but one country's approach to the distinction in state immunity between acts *jure imperii* and acts *jure gestionis*, and there are many other approaches in the world.[5]

Such fragmentation in the interpretation of the immunities in these governing documents and the IOIA would undermine the United States' interest as a member and beneficiary of much of the humanitarian and other public interest work of these international organizations, and effectively

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[5] Whereas the FSIA focuses on the nature of the acts, courts in some countries continue to refer to the purpose of the acts in making determinations about state immunity, and Article 2.2 of the United Nations Convention on the Jurisdictional Immunities of States and Their Property allows consideration of the purpose if that is the practice in the state of the forum. David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l L. 194, 199 (2005).

violate the United States' commitments to other nations and the international community as a whole. Petitioners' position, if accepted, could therefore create a perverse rationale for international organizations to restructure their operations to severely reduce their contact with the United States in order to avoid the increased risk of being potentially subject to suit in this country.

For the courts of one member state to unilaterally redefine the immunities accepted and relied upon by all parties after years in which no question was raised about those immunities would threaten the careful diplomatic balance struck when international organizations were founded and empowered to conduct their humanitarian and other public interest efforts around the world. Member states rely on the immunities enumerated in the governing documents they agreed to when founding these international organizations and on the historical backdrop of the IOIA providing absolute immunity to international organizations in the United States legal system. It would be profoundly disruptive for one country, the United States, to change the rules of the game by exercising judicial jurisdiction contrary to what was agreed in the international organization's governing documents or generally understood to be permitted by the IOIA. This is particularly true for the United States, which has "assumed [the role] as 'host' to an ever-growing number of international organizations." Preuss, *The International Organizations Immunities Act* at 338.

If the United States were to deny the regime of absolute immunity historically afforded to international organizations under the IOIA and international consensus, it would not only violate its commitments under international agreements, but would place itself at odds with other member states that acknowledge international organizations' absolute immunities. *See Broadbent*, 481 F. Supp. at 908 ("The United States has accepted without qualification the principle that international organizations must be free to perform their functions and that no member state may take action to hinder the organization."); *see also, e.g.*, *World Bank Grp. v. Wallace*, 2016 SCC 16 ¶ 93 (Can.) ("It is part of the original agreement that in exchange for admission to the international organization, every member state agrees to accept the concept of collective governance. As a result, no single member can attempt to control the institution . . . "). For example, United Nations specialized agencies, including *amici* FAO, IFAD, UNIDO, WHO, and WIPO, have been granted immunity from every form of legal process absent a waiver of immunity by the Convention on the Privileges and Immunities of the Specialized Agencies, which is recognized by the 129 states who are parties to the Convention. *See* U.N. Treaty Collection, *Convention on the Privileges and Immunities of the Specialized Agencies*, https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iii-2&chapter=3&lang=en. A decision by this Court that unilaterally redefines the scope of these immunities in the United States would be contrary to the widespread acceptance of these organizations' absolute immunity by other

United Nations member states. This could also encourage a race to United States courts, which would be flooded with plaintiffs attempting to use these courts as the only permissible forum for claims that could not otherwise be brought against specialized agencies in other jurisdictions.

II. APPLICATION OF A COMMERCIAL ACTIVITY EXCEPTION TO INTERNATIONAL ORGANIZATIONS' IMMUNITY FRUSTRATES INTERNATIONAL ORGANIZATIONS' ABILITY TO FULFILL THEIR PURPOSES AND THEIR MEMBER STATES' INTERESTS

Despite this weighty history and longstanding legal doctrine and the reliance of international organizations on the protection it supports, petitioners urge the Court to read the IOIA to subject international organizations to the jurisdiction of the United States courts if they engage in commercial activities, which the FSIA measures by the "nature" and not the "purpose" of such activities. 28 U.S.C. §§ 1603(d), 1605(a)(2). *See also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). While *amici* do not consider that any of their activities are "commercial activities" within the meaning of the FSIA, the very threat that this claim could be made could cause expense and disruption to them because of potential litigation.

Because the FSIA's distinction between sovereign and commercial acts is wholly

inapplicable to international organizations, this standard could throw into confusion the immune status of a multitude of activities that international organizations do or could engage in and without which they could not function to fulfill their basic missions. *See Azima v. RAK Inv. Auth.*, 305 F. Supp. 3d 149, 161 (D.D.C. 2018), *appeal pending* ("For example, courts have held that retaining an attorney, contracting to buy goods or services, or repudiating a contract for goods and services all qualify as 'commercial activities' under the FSIA.") (citing cases). This would create a risk that United States courts would accept jurisdiction over claims brought against international organizations.

Indeed, because the FSIA definition of "commercial activity" does not turn on the "purpose" of the activity or exclude non-profit activities from its purview, *Hilaturas Miel, S.L. v. Republic of Iraq*, 573 F. Supp. 2d 781, 794 (S.D.N.Y. 2008) (contract to purchase yarn was a commercial activity even though the transaction was part of the United Nations Oil for Food Program), even humanitarian and other public interest work conducted in or having a direct effect in the United States could subject international organizations to the jurisdiction of United States courts. Regardless of their *pro bono publico* purpose, much of what international organizations do could become a basis for creative plaintiffs to seek to use United States courts as a forum to prevent or influence the operations and decisions of these organizations, separate from and in competition with the governing organs of these multilateral organizations.

Because of this broad interpretation of "commercial activity," petitioners' reading, if adopted, would all but ensure serious threats of litigation that would, in itself, undermine the activities and missions of these organizations. International organizations would have to dedicate significant resources to defending themselves against suit, including against suits aimed at influencing how international organizations fulfill their purposes. International organizations could be either directly prevented from carrying out their mandates, or have their independence and impartiality jeopardized.

An international organization's immunities protect the assets of the organization from being used for any reason and by any means other than what was specifically and collectively authorized by its member states in the treaty or international agreement that created it. A judicial decision to the contrary would violate a fundamental protection that enables the organization to conduct its international responsibilities, as provided in the treaty or agreement that created it.

A. Application of the FSIA commercial activity exception would frustrate international organizations' ability to fulfill their missions

1. *Importing the commercial activity exception from the FSIA would divert valuable resources*

Allowing international organizations to be sued in United States courts by invoking the FSIA's commercial activity exception would impose considerable burdens on the organizations and redirect their attention and finite resources to defend against an increasing number of suits and asset their immunities. Absolute immunity means that international organizations historically have been free from the burdens of *both* "the consequences of litigation's results [*and*] also the burden of defending" themselves in court. *Nyambal v. Int'l Monetary Fund*, 772 F.3d 277, 280 (D.C. Cir. 2014) (citation omitted).

Until now, courts have routinely recognized the immunities of international organizations to a variety of claims. *See, e.g.*, *Donald v. Orfila*, 788 F.2d 36 (D.C. Cir. 1986) (upholding immunity of OAS in wrongful termination claim brought by former employee); *Sadikoglu v. U.N. Dev. Programme*, No. 11 Civ. 0294(PKC), 2011 WL 4953994 (S.D.N.Y. Oct. 14, 2011) (upholding immunity of the United Nations Development Program in a contract dispute with third party vendor or contractor); *Inversora Murten, S.A. v.*

Energoprojekt-Niskogradnja Co., 264 F. App'x 13 (D.C. Cir. 2008) (upholding immunity of the World Bank from a writ of attachment against its assets in the United States); *Nyambal*, 772 F.3d at 277 (upholding immunity of the IMF against an order for jurisdictional discovery); *United States v. Chalmers*, No. S5 05 CR 59(DC), 2007 WL 624063 (S.D.N.Y. Feb. 26, 2007) (upholding immunity of the United Nations against a motion to compel the production of documents). Under the FSIA exception, instead of being dismissed at the outset on immunity grounds, such suits, even if ultimately found meritless, would go forward into time-consuming and expensive discovery. One only has to compare the small number of cases involving the IOIA since its enactment in 1945 to the exponentially larger number of cases involving the FSIA since 1976 to appreciate the significant financial burden and diversion of management's focus that restricting international organizations' immunity would have.[6] Applying FSIA analysis to Section 288a(b) also leads to a procedural conundrum under the IOIA because Section 288a(c) separately guarantees that international organizations are immune from most forms of discovery ("The archives of international

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[6] Indeed, one search by counsel for state and federal cases referencing the IOIA identified only approximately 200 relevant cases. In contrast, a search by counsel for state and federal cases referencing the FSIA identified nearly 4,000 cases.

organizations shall be inviolable."). 22 U.S.C. § 288a(c). [7]

The possibility of suit under the laws of each of the fifty states of the United States, and the different laws of every one of the countries in which an international organization operates, would only add to the burdens. In the employment context for example, international organizations would have to contend with "the sheer difficulty of administering multiple employment practices in each area in which an organization operates [which] suggests that the purposes of an organization could be greatly hampered if it could be subjected to suit by its employees worldwide." *Mendaro*, 717 F.2d at 615-16.

2. *The application of the commercial activity exception to international organizations' immunities would undermine their missions*

"[T]he very structure of an international organization . . . requires that the organization remain independent from the intranational policies of its individual members," *Mendaro*, 717 F.2d at 616, as well as from the influences of interested private parties. Subjecting international organizations to jurisdiction based on their alleged

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[7] Petitioners' argument fails to take into account the serious uncertainties international organizations would face regarding how and when the FSIA and its exceptions would apply. Resp't's Br. at 40-43.

commercial activities would allow private parties to use the United States judicial system to try to dictate international organizations' priorities and the way they conduct their activities. Petitioners here are not the first who have sought to control how international organizations can act and whether they can act at all. *See, e.g.*, *Atl. Tele-Network Inc. v. Inter-Am. Dev. Bank*, 251 F.Supp.2d 126, 132 (D.D.C. 2003) (unsuccessful suit for temporary restraining order and injunction against loan intended to finance telecommunications system that would compete with plaintiff's system); *Bro Tech Corp. v. European Bank for Reconstruction and Dev.*, No. CIV.A. 00–2160, 2000 WL 1751094 (E.D. Pa. Nov. 29, 2000) (dismissing suit arising out of European Bank for Reconstruction and Development's refusal to re-finance plaintiff's loans because international organization's absolute immunity was only subject to limited waiver).

This potential threat to international organizations' independence and the need to ensure equal treatment by member states is precisely why international organizations enjoy absolute immunity in the first place. *See, e.g.*, *Mendaro*, 717 F.2d at 615 ("the purpose of immunity . . . is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory."); *Lutcher S.A. Celulose E Papel Condoi, Parana, Brazil v. Inter-Am. Dev. Bank*, 253 F. Supp. 568, 570 (D.D.C. 1966) ("cases involving the discretion and judgment of the Bank's governing board in matters of economic policy

closely associated with consideration of international politics are vastly different from cases involving simple torts and contracts. Where delicate, complex issues of international economic policy are involved, jurisdiction should be denied."); *cf. Samantar*, 560 U.S. at 311 (at common law, foreign sovereign immunity was "a matter of grace and comity") (quoting *Verlinden*, 461 U.S. at 486).

The dangers of eliminating international organizations' immunity from suit go far beyond impeding the vital work of multilateral development banks or international finance institutions like respondent IFC. Because the FSIA's commercial activity exception has been interpreted broadly by United States courts to encompass activities that can be done by a private actor in or having a direct effect in the United States, all international organizations with connection to the United States could potentially be sued by plaintiffs seeking to influence the way they carry out their missions. The risk of such suits would itself have a chilling effect on the functioning of international organizations.

B. Application of the commercial activity exception from the FSIA would impose a considerable burden on member states

Exposing international organizations to suit in the United States would also impose a considerable financial burden on their member states. International organizations are financed, either in whole or in part, by their member states,

with their budgets dedicated to the fulfillment of their missions. *See, e.g.*, Great Lakes Fishery Commission, *Budget*, http://www.glfc.org/budget.php (noting that the GLFC is funded by the United States and Canada, with the United States contributing 69 percent of its budget). Any expenses resulting from litigation would constitute extra-budgetary expenses to be collectively borne by the member states, including, where applicable, the United States. These international organizations would therefore need to increase their funding from member states to accommodate the anticipated costs of defending themselves from litigation.

III. INTERNATIONAL ORGANIZATIONS ALREADY HAVE GOVERNANCE AND REGULATION MECHANISMS

Finally, any suggestion that litigation in U.S. courts by private adversaries is an appropriate or necessary mechanism for regulating the behavior of international organizations, and that their immunities should therefore be restricted to permit such litigation, is radically unsound. *First*, the IOIA already contains an "explicit mechanism for monitoring the immunities of designated international organizations." *Atkinson*, 156 F.3d at 1341. *See also In re Dinastia, L.P.*, 381 B.R. 512, 520 (S.D. Tex. 2007) (quoting *Mendaro*, 717 F.2d at 613-14).

Second, international organizations have robust mechanisms of oversight, and are subject to international and collective regulation by various

decision-making bodies comprised of representatives from member states and elected officers. For example, the OECD has a governing structure headed by a Council formed of representatives of member countries tasked with oversight and strategic direction decisions made on a consensus basis. *See* OECD, *Who does what*, http://www.oecd.org/about/whodoeswhat/. In demonstrating their commitment to carry out their missions in an ethical and accountable manner, international organizations additionally provide for oversight and auditing mechanisms and engage in transparent self-reporting. *See, e.g.*, UNIDO Indus. Dev. Org., Rep. on the Work of Its Forty-Fourth Session, GC.17/2 (2016) (establishing the Independent Audit Advisory Committee of UNIDO).

Third, many international organizations have put in place their own mechanisms to resolve disputes. For example, the International Labour Organization Administrative Tribunal hears complaints brought by current and former employees of various international organizations, including certain *amici*. *See* International Labour Organization, *Membership*, https://www.ilo.org/tribunal/membership/lang--en/index.htm. Other international organizations have similar mechanisms for dealing with disputes without consenting to jurisdiction of national courts.

CONCLUSION

For the reasons set forth above, the Court should affirm the Court of Appeals decision below.

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BUDHA ISMAIL JAM, et al.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. The Reference Canon Is A Fundamental Principle Of Statutory Construction 6

II. Under the Reference Canon, the IOIA Dynamically Incorporates the Law of Foreign Sovereign Immunity. 9

III. The D.C. Circuit's Interpretation of the IOIA Raises Serious Constitutional Concerns. 13

IV. Failure to Recognize General References as Dynamic Would Impede Congress's Ability To Legislate Effectively 16

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Ali v. Fed. Bureau of Prisons,
552 U.S. 214 (2008) 10

Appeal of Free,
301 Pa. 82, 151 A. 583 (Pa. 1930) 8

Atkinson v. Inter-American Dev. Bank,
156 F.3d 1335 (D.C. Cir. 1998) 11, 14

Boise City v. Baxter,
41 Idaho 368, 238 P. 1029 (Idaho 1925) 8

Bond v. United States,
134 S. Ct. 2077 (2014) 6

Bowen v. Georgetown Univ. Hosp.,
488 U.S. 204 (1988) 12

Bowles v. Russell,
551 U.S. 205 (2007) 14

Case of Sewing Mach. Co.,
85 U.S. (18 Wall.) 553 (1873) 13

City of Arlington, Tex. v. FCC,
569 U.S. 290 (2013) 6

Clark v. Crown Const. Co.,
887 F.2d 149 (8th Cir. 1989) 19

Cole v. Donovan,
106 Mich. 692, 64 N.W. 741 (Mich. 1895) 8

Culver v. People,
161 Ill. 89, 43 N.E. 812 (Ill. 1896) 8

Dabney v. Hooker,
121 Okla. 193, 249 P. 381 (Okla. 1926) 8

Dir., Off. of Workers' Compen. Programs, U. S. Dept. of Lab. v. E. Coal Corp.,
561 F.2d 632 (6th Cir. 1977) 19

Dir., Off. of Workers' Compen. Programs, U. S. Dept. of Lab. v. Peabody Coal Co.,
554 F.2d 310 (7th Cir. 1977) 19

Dir., Off. of Workers' Compen. Programs, U.S. Dept. of Lab. v. Natl. Mines Corp.,
554 F.2d 1267 (4th Cir. 1977) 19

EEOC v. Arabian Am. Oil Co.,
499 U.S. 244 (1991) 6

El Encanto, Inc. v. Hatch Chile Co., Inc.,
825 F.3d 1161 (10th Cir. 2016) 18

Gasperini v. Ctr. for Humanities, Inc.,
518 U.S. 415 (1996) 20

Gaston v. Lamkin,
115 Mo. 20, 21 S.W. 1100 (Mo. 1893) 8

George Williams Coll. v. Vill. of Williams Bay,
242 Wis. 311, 7 N.W.2d 891 (Wis. 1943) 8

Gregory v. Ashcroft,
501 U.S. 452 (1991) 15

Harris v. White,
81 N. Y. 532, 36 Sickels 532 (N.Y. 1880) 8

Hassett v. Welch,
303 U.S. 303 (1938) 7

Hecht v. Shaw,
112 Fla. 762, 151 So. 333 (Fla. 1933) 8

In re Argyle-Lake Shore Bldg. Corp.,
78 F.2d 491 (7th Cir. 1935) 8

In re Heiman's Will,
35 N.M. 522, 2 P.2d 982 (N.M. 1931) 8

Jam v. Int'l Fin. Corp.,
860 F.3d 703 (D.C. Cir. 2017) ..... passim

Johnson v. Laffoon,
257 Ky. 156, 77 S.W.2d 345 (Ky. 1934) 8

Kucana v. Holder,
558 U.S. 233 (2010) 15

Morrison v. Nat'l Australia Bank Ltd.,
561 U.S. 247 (2010) 6

N.L.R.B. v. Robbins Tire & Rubber Co.,
437 U.S. 214 (1978) 12

Nat'l Ass'n of Mfrs. v. Dep't of Def.,
138 S. Ct. 617 (2018) 9

Newman v. City of North Yakima,
7 Wash. 220, 34 P. 921 (Wash. 1893) 8

Norfolk & Western R. Co.,
499 U.S. 117 (1991) 10

Oss Nokalva, Inc. v. European Space Agency,
617 F.3d 756 (3d Cir. 2010) 3, 10, 12, 17

Patchak v. Zinke,
138 S. Ct. 897 (2018) 14

Sebelius v. Auburn Reg. Med. Center,
568 U.S. 145 (2013) 14

State ex rel. Timken Roller Bearing Co. v. Indus. Comm'n,
136 Ohio St. 148, 24 N.E.2d 448 (Ohio 1939) 8

State ex rel. Walsh v. Buckingham,
58 Nev. 342, 80 P.2d 910 (Nev. 1938) 8

State v. Beckner,
197 Iowa 1252, 198 N.W. 643 (Iowa 1924) 8

State v. Leich,
166 Ind. 680, 78 N.E. 189 (Ind. 1906) 8

United States v. Curry,
47 U.S. (6 How.) 106 (1848) 14

United States v. Dire,
680 F.3d 446 (4th Cir. 2012) 19, 20

United States v. Manahan Chem. Co.,
23 C.C.P.A. 332 (C.C.P.A. 1936) 8

United States v. Said,
798 F.3d 182 (4th Cir. 2015) 19

Vallejo & N.R. Co. v. Reed Orchard Co.,
177 Cal. 249, 170 P. 426 (Cal. 1918) 8

STATUTES

18 U.S.C. § 1651 19

22 U.S.C. § 288 ..... 4, 11

22 U.S.C. § 288a 3, 5, 9

28 U.S.C. § 1605 ..... 3, 12

28 U.S.C. § 1652 20

30 U.S.C. § 932 18

35 U.S.C. § 24 18

CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 1 13

LEGISLATIVE MATERIAL

91 Cong. Rec. 12,432 (Dec. 20, 1945) 16

Judiciary Act, ch. 20, § 9, 1 Stat. 73 (1789) 14

OTHER AUTHORITIES

Br. for the United States as Amicus Curiae,
Broadbent v. Org. of Am. States,
628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465) 13

Br. for the United States as Amicus Curiae, *Corrinet v. United Nations*, 1997 WL 33702375 (9th Cir. Mar. 12, 1997) (No. 96-17130) 13

Br. for the United States as Amicus Curiae, *Taiwan v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 1997 WL 33555046 (9th Cir. May 28, 1997) (No. 97-70375) 13

William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992) 15

Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947) 6

Restatement (Third) of Foreign Relations Law § 221 (1987) 16

Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts (2012) 7

Norman J. Singer & J.D. Shambie Singer, 2B Sutherland Statutory Construction (7th ed. 2015) 18

J.G. Sutherland, *Statutes and Statutory Construction* (2d ed. 1904) 7, 8, 9, 12

Kevin M. Whiteley,
Holding International Organizations Accountable Under the Foreign Sovereign Immunities Act: Civil Actions Against the United Nations for Non-Commercial Torts,
7 Wash. U. Global Stud. L. Rev. 619 (2008) 10

INTEREST OF THE *AMICI CURIAE*[1]

Senator Bill Nelson, a Democrat, is the senior United States Senator from Florida. He has been a member of the Senate since 2001. Prior to that, he was a member of the U.S. House of Representatives, representing Florida's 9th and 11th congressional districts, from 1979 to 1991.

Representative Ileana Ros-Lehtinen, a Republican, is the most senior U.S. Representative from Florida and represents the state's 27th congressional district. She has been a member of Congress since 1989, and she served as chair of the House Foreign Affairs Committee from 2011–13. She retains the title of chair emeritus of the Committee.

Representative Alcee L. Hastings, a Democrat, represents Florida's 20th congressional district and has been a member of Congress since 1993. Since 2007, he has served as either the chair or ranking member of the Commission on Security and Cooperation in Europe (CSCE), also known as the U.S. Helsinki Commission.

Representative Mario Diaz-Balart, a Republican, represents Florida's 25th congressional district and has been a member of Congress since 2003.

Representative Debbie Wasserman Schultz, a Democrat, represents Florida's 23rd congressional

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[1] All parties have consented to the filing of this amicus brief. No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than *amici* and their counsel contributed money that was intended to fund the preparation or submission of this brief.

district and has been a member of Congress since 2005.

Representative Jeff Duncan, a Republican, represents South Carolina's 3rd congressional district and has been a member of Congress since 2011.

Representative Carlos Curbelo, a Republican, represents Florida's 26th congressional district and has been a member of Congress since 2015.

Representative Darren Soto, a Democrat, represents Florida's 9th congressional district and has been a member of Congress since 2017.

Amici are uniquely positioned to address the importance of canons of construction and the background principles of statutory interpretation against which Congress legislates. Congress relies on those canons when legislating, and its ability to rely on that interpretive background promotes necessary legislative efficiency and consistency.

Here, in particular, those canons dictate that the scope of immunity for international organizations under the International Organizations Immunities Act ("IOIA") mirror the scope of immunity currently afforded to foreign sovereigns. This is the only interpretation that gives effect to Congress's intent. Moreover, only this interpretation avoids the substantial constitutional difficulties raised by assuming, as the D.C. Circuit did here, that Congress delegated to the President the broad power to define the jurisdiction of federal courts as to a whole class of defendants.

SUMMARY OF THE ARGUMENT

In 1945, Congress stated in section 2 of the International Organizations Immunities Act that "[i]nternational organizations . . . shall enjoy the same immunity from suit . . . as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). At the time, courts generally deferred to the political branches about the scope of immunity, and foreign sovereigns often enjoyed absolute immunity from suit in federal courts. But after the IOIA's passage, Congress enacted the Foreign Sovereign Immunity Act ("FSIA") to narrow that immunity substantially, making foreign sovereigns liable to suit for their commercial activities. *See* 28 U.S.C. § 1605(a)(1)–(2). The question in this case is whether, in narrowing that immunity, Congress also meant to narrow the immunity of international organizations that "enjoy the same immunity from suit . . . as is enjoyed by foreign governments." 22 U.S.C. § 288a(b).

The D.C. Circuit, adhering to an earlier circuit case that bound the panel, said no. But the Third Circuit, confronted with the same question in 2010, said yes. Applying the "reference canon"—which holds that a reference to a general body of law includes all subsequent developments in that body of law occurring after the initial reference—the Third Circuit concluded that "the FSIA's exception for suits arising out of a government's commercial transactions . . . is equally applicable to international organizations and is incorporated into the IOIA." *Oss Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 766 (3d Cir. 2010). The Third Circuit's approach is the right one.

The reference canon, on which the Third Circuit relied, is a well-established principle of statutory construction on which Congress relies when drafting legislation. This canon has been described in the leading treatise on statutory interpretation since at least the early years of the last century, and this Court has relied on it dozens of times since at least 1880. Accordingly, the canon was an established part of the legal landscape against which Congress enacted the IOIA in 1945. Absent any strong textual indication to the contrary, it should govern this Court's construction of the statute. Any other outcome would place into question settled interpretations of many other statutes where courts interpret Congress's use of general references to include subsequent enactments and modifications.

Moreover, this construction of the IOIA avoids a glaring constitutional problem with the D.C. Circuit's reasoning. The D.C. Circuit relied heavily—indeed, almost exclusively—on a provision of section 1 of the statute, which gives the President the power, by executive order, to "withhold or withdraw" or "condition or limit the enjoyment" of immunities provided for by the IOIA, "in the light of the functions performed by any such international organization." 22 U.S.C. § 288. This provision, the D.C. Circuit claimed, demonstrates that Congress delegated to the President the power to take into account post-enactment updates to foreign sovereign immunity and to apply those updates to international organizations. From that, it drew the conclusion that section 2's view of foreign sovereign immunity was frozen in amber in 1945 and did not take into account post-enactment modifications to that immunity.

As a textual matter—indeed, as a matter of plain common sense—that conclusion is wrong. Nothing in either section explicitly states that the scope of international organization immunity is limited by the state of the law in 1945. To the contrary, the more natural reading of section 2 is that the IOIA incorporates the law of foreign sovereign immunity as it exists at the time the claim of immunity is made. Likewise, the most natural reading of section 1 is that Congress delegated to the President the power to make case-by-case determinations about the immunity of international organizations in the interests of American foreign policy.

But there is *no* reason to believe that Congress delegated to the President its entire power to expand or contract the jurisdiction of federal courts in a broad swathe of cases involving international organizations. Article III gives that power exclusively to Congress, and Congress should not be presumed to have delegated it to the President absent clear, convincing textual evidence that this is what Congress intended. There is no such clear statement in the IOIA, which should be interpreted in a way that avoids the substantial separation-of-powers concerns that would be generated by such a broad delegation of Congressional power.

The decision below should be reversed.

ARGUMENT

Under the IOIA, international organizations enjoy the same immunity to suit that is enjoyed by foreign governments. 22 U.S.C. § 288a(b). This reference is general—that is, it refers not to a specific

statute, but to a body of law. Under the reference canon, a well-established principle of statutory construction, such references include subsequent enactments and amendments to that body of law. The D.C. Circuit's decision to ignore the import of the reference canon in this case depends on a troubling misreading of the statute raising serious constitutional difficulties. This Court should reject it.

I. The Reference Canon Is A Fundamental Principle Of Statutory Construction.

As this Court recently observed, "[p]art of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). "As Justice Frankfurter put it in his famous essay on statutory interpretation, correctly reading a statute 'demands awareness of certain presuppositions.'" *Id.* (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). And those "presumption[s] about a statute's meaning" include canons of construction. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). Simply put, Congress is presumed to legislate against the well-established backdrop of those canons. These "tools of statutory construction" are crucial in determining the "expressed intent of Congress," embodied in the plain meaning of statutory texts. *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013).

The reference canon is a long-standing canon of statutory construction, predating the 1945 promulgation of the IOIA. In 1904, a leading treatise, J.G. Sutherland's *Statutes and Statutory Construction* (2d ed. 1904) ("Sutherland"),[2] discussed this canon. According to Sutherland, the reference canon has two components: first, "[w]here one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provision adopted, . . . [s]uch adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent." *Id.* at 787–88. But, when "the reference is, not to any particular statute or part of a statute, but to the law generally which governs a particular subject. . . [t]he reference . . . means the law as it exists from time to time or at the time the exigency arises to which the law is to be applied." *Id.* at 789. This Court approvingly cited section 405 of Sutherland in 1938. *See Hassett v. Welch*, 303 U.S. 303, 314 n.17 (1938).

By the time the IOIA was passed, federal and state courts had repeatedly adopted Sutherland's distinction between specific references and general ones. *See, e.g., In re Argyle-Lake Shore Bldg. Corp.*,

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[2] Sutherland is a leading authority on statutory construction. *See* Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 204 (2012) (identifying Sutherland as "a leading American treatise"). A Westlaw search shows that this Court has cited various editions of Sutherland in more than 70 opinions from 1929 through 2018. *See, e.g., Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018); *Posados v. Warner, Barnes & Co.*, 279 U.S. 340, 344 (1929).

78 F.2d 491, 494 (7th Cir. 1935); *United States v. Manahan Chem. Co.*, 23 C.C.P.A. 332, 335 (C.C.P.A. 1936).[3] This abundance of case law leaves no doubt: When Congress enacted the IOIA in 1945, it did so against the backdrop of a well-established body of law directing that the scope of "general" references in statutes be delineated by "the law generally which governs a particular subject," meaning "the law as it exists . . . at the time the exigency arises to which the law is to be applied," not the law as it existed at the time of enactment. Sutherland, *supra*, at 789.

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[3] *See also, George Williams Coll. v. Vill. of Williams Bay*, 242 Wis. 311, 316, 7 N.W.2d 891, 894 (Wis. 1943); *State ex rel. Timken Roller Bearing Co. v. Indus. Comm'n*, 136 Ohio St. 148, 24 N.E.2d 448, 450 (Ohio 1939); *State ex rel. Walsh v. Buckingham*, 58 Nev. 342, 80 P.2d 910, 913 (Nev. 1938); *Johnson v. Laffoon*, 257 Ky. 156, 77 S.W.2d 345, 347 (Ky. 1934); *Hecht v. Shaw*, 112 Fla. 762, 765, 151 So. 333, 333 (Fla. 1933); *In re Heiman's Will*, 35 N.M. 522, 2 P.2d 982, 982 (N.M. 1931); *Appeal of Free*, 301 Pa. 82, 85, 151 A. 583, 584 (Pa. 1930); *Dabney v. Hooker*, 1926 OK 751, 121 Okla. 193, 249 P. 381, 384 (Okla. 1926); *Boise City v. Baxter*, 41 Idaho 368, 238 P. 1029, 1033 (Idaho 1925); *State v. Beckner*, 197 Iowa 1252, 198 N.W. 643, 644 (Iowa 1924); *Vallejo & N.R. Co. v. Reed Orchard Co.*, 177 Cal. 249, 254, 170 P. 426, 428 (Cal. 1918); *State v. Leich*, 166 Ind. 680, 78 N.E. 189, 190 (Ind. 1906); *Culver v. People*, 161 Ill. 89, 97, 43 N.E. 812, 814 (Ill. 1896); *Cole v. Donovan*, 106 Mich. 692, 694, 64 N.W. 741, 741 (Mich. 1895); *Gaston v. Lamkin*, 115 Mo. 20, 21 S.W. 1100, 1103 (Mo. 1893); *Newman v. City of North Yakima*, 7 Wash. 220, 221–22, 34 P. 921, 921–22 (Wash. 1893); *Harris v. White*, 81 N. Y. 532, 545, 36 Sickels 532, 545 (N.Y. 1880).

II. Under the Reference Canon, the IOIA Dynamically Incorporates the Law of Foreign Sovereign Immunity.

The text of the IOIA, as informed by the reference canon, evinces Congress's intent to tie the scope of international organizations' immunity to that of foreign governments. As the latter evolves, so too does the former. Thus, in determining whether an international organization has immunity, the appropriate analysis looks to the foreign governments' immunity as it exists at the time the claim of immunity is invoked, not as it was in 1945. Under that analysis, international organizations are entitled to the same immunity as foreign governments—no more, no less.

To determine the meaning of the IOIA, the "inquiry begins with the statutory text." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018). Section 2 of the IOIA states that "[i]nternational organizations . . . shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). The reference, clearly, is to a *body* of law—the law governing the immunity of foreign sovereigns—and not to a specific statute, enacted at a particular time. It is thus a general reference, "not to any particular statute or part of a statute, but to the law generally which governs a particular subject." Sutherland, *supra*, at 789. Indeed, no one disagrees that section 2 is a general reference. *See Jam v. Int'l Fin. Corp.*, 860 F.3d 703, 708 (D.C. Cir. 2017) (Pillard, J., concurring) (noting the general reference and stating that "[w]hen a statute incorporates

existing law by reference, the incorporation is generally treated as dynamic, not static: As the incorporated law develops, its role in the referring statute keeps up"); *OSS Nokalva*, 617 F.3d at 764 ("[W]e interpret the IOIA in light of the Reference Canon to mean that Congress intended that the immunity conferred by the IOIA would adapt with the law of foreign sovereign immunity."); Kevin M. Whiteley, *Holding International Organizations Accountable Under the Foreign Sovereign Immunities Act: Civil Actions Against the United Nations for Non-Commercial Torts*, 7 Wash. U. Global Stud. L. Rev. 619, 635–39 (2008) (IOIA "fails to mention any particular statute either by title or section number. Doing so would have definitively made the IOIA a statute of specific reference as defined and exemplified above. Instead, the IOIA refers to the law on a subject generally: immunity for foreign governments.").

Of course, interpretive canons are not always dispositive; they "must yield 'when the whole context dictates a different conclusion.'" *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008) (quoting *Norfolk & Western R. Co.*, 499 U.S. 117, 129 (1991)). But nothing in the plain text of the IOIA points to a different conclusion. *See OSS Nokalva*, 617 F.3d at 764 ("If Congress wanted to tether international organization immunity to the law of foreign sovereign immunity as it existed at the time the IOIA was passed, it could have used language to expressly convey this intent.").

Rather, the D.C. Circuit declined to apply the reference canon because it found that section 1 of the

IOIA "sets forth an explicit mechanism for monitoring the immunities of designated international organizations: the President retains authority to modify, condition, limit, and even revoke the otherwise absolute immunity of a designated organization." *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998) (citing 22 U.S.C. § 288). The applicable provision states:

> The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this subchapter (including the amendments made by this subchapter) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity.

22 U.S.C. § 288. The D.C. Circuit viewed this provision as showing Congress's intent to peg immunity under the IOIA to the law of immunity as it existed in 1945, while delegating to the President the power to make any subsequent changes to the scope of immunity for foreign sovereigns or organizations. *Atkinson*, 156 F.3d at 1341. Not so.

On its face, section 1 simply delegates to the President the power to exempt *specific* organizations and their officers from otherwise generally applicable immunities, in light of the organization's functions. The giveaway, as Judge Pillard noted (*see Jam*, 860 F.3d at 709) is the provision's use of the singular "*any*

such international organization," which clearly implies that the President will make case-by-case determinations of an organization's immunity based on the criteria laid out in the statute. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 210 (1988) (use of the singular in statutory construction "is intended to authorize case-by-case inquiry"); *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 223 (1978) (statutory provision that refers to "particular cases . . . seem[s] to require a showing that the factors made relevant by the statute are present in each distinct situation"). As the Third Circuit noted, "nothing in the statutory language or legislative history . . . suggests that the IOIA provision delegating authority to the President to alter the immunity of international organizations precludes incorporation of any subsequent change to the immunity of foreign sovereigns." *OSS Nokalva*, 617 F.3d at 763.

Applying the reference canon, the IOIA adopts the law of foreign sovereign immunity "at the time the exigency arises to which the law is to be applied," which includes post-1945 amendments and modifications. Sutherland, *supra*, at 789; *see also Jam*, 860 F.3d at 709 (Pillard, J., concurring). The result is that FSIA's modifications to foreign sovereign immunity, including the provision that foreign sovereigns are no longer immune from suit if the "action is based upon a commercial activity carried on in the United States," 28 U.S.C. § 1605(a)(2), apply with equal force to international organizations subject to the IOIA. Such a holding would not only be consistent with the intent of Congress, as indicated in the text of the IOIA, but

also with the position regularly taken by the United States in litigation. The United States has argued across several administrations that the IOIA incorporates the FSIA limitations on immunity. Br. for the United States as Amicus Curiae at 5, *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465); Br. for the United States as Amicus Curiae at *5 n.3, *Taiwan v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 1997 WL 33555046 (9th Cir. May 28, 1997) (No. 97-70375); Br. for the United States as Amicus Curiae at *14, *Corrinet v. United Nations*, 1997 WL 33702375 (9th Cir. Mar. 12, 1997) (No. 96-17130).

III. The D.C. Circuit's Interpretation of the IOIA Raises Serious Constitutional Concerns.

Besides the plain text of the IOIA, there is another reason to reject the D.C. Circuit's interpretation of the statute: it potentially raises serious constitutional concerns about a sweeping delegation of Congress's Article III power to regulate federal courts' jurisdiction.

It is axiomatic, of course, that Congress has the power to set the jurisdiction of the lower federal courts. *See* U.S. Const. art. III, § 1. *See also Case of Sewing Mach. Co.*, 85 U.S. (18 Wall.) 553, 559–60 (1873) (Article III "remits to Congress the duty to create . . . the necessary Federal tribunals; to prescribe under what circumstances and in what mode their jurisdiction shall be exercised; and also to determine from time to time, in view of the condition of the country, under what restrictions it shall be exercised."); *United States v. Curry*, 47 U.S. (6 How.)

106, 113 (1848) ("The power to hear and determine a case like this is conferred upon the court by acts of Congress."). This power to determine what cases can be heard includes the power to "determine when, and under what conditions, federal courts can hear them." *Bowles v. Russell*, 551 U.S. 205, 212–13 (2007). And it includes the power to permit or constrain cases against certain classes of defendants. *See Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (law prohibiting suits "relating to" a particular property "is well within Congress' authority and does not violate Article III"). *Cf.* Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (providing that the district courts "shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls").

Though couched in terms of immunity to suit, the IOIA is nonetheless a jurisdictional statute: it extends federal court jurisdiction to hear suits against a class of defendants. *See Patchak*, 138 S. Ct. at 905 ("[T]his Court does not require jurisdictional statutes to 'incant magic words.'") (quoting *Sebelius v. Auburn Reg. Med. Center*, 568 U.S. 145, 153 (2013)). In this case, the D.C. Circuit held that international organizations' immunity is governed by the state of the law in 1945, and that "Congress was content to delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances." *Atkinson*, 156 F.3d at 1341. *See also Jam*, 860 F.3d at 705 ("Congress anticipated the possibility of a change to immunity of international organizations, but explicitly delegated the responsibility to the

President to effect that change.") (citing *Atkinson*, *supra*).

This was error. Section 1's at-best ambiguous language provides no clear basis for determining that Congress intended to delegate to the President its Article III power to set federal courts' jurisdiction in terms broadly applicable to a whole class of defendants. Rather, separation-of-powers concerns "caution [this Court] against reading legislation, absent clear statement," as delegating one branch's constitutionally prescribed power to another. *Kucana v. Holder*, 558 U.S. 233, 237 (2010). In light of Article III's explicit and unconditioned vesting in Congress of the power to set the jurisdiction of federal courts, only upon the most explicit textual evidence should Congress be understood to have delegated that power to the President. *See Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("'In traditionally sensitive areas, . . . the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" (citations omitted)); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 631 (1992) (interpretive presumptions and clear statement requirements "can protect important constitutional values against accidental or undeliberated infringement").

Section 1 contains no such "clear statement" that Congress was delegating to the President the broad authority to adjust the immunity of whole classes of defendants to take account of later developments in

foreign sovereign immunity. Accordingly, the Court should apply the reference canon and avoid the serious constitutional issues that would be raised by adopting the D.C. Circuit's view of section 1.

IV. Failure to Recognize General References as Dynamic Would Impede Congress's Ability To Legislate Effectively

Congress's ability to effectively legislate depends in substantial part upon its ability to rely on general, dynamic references. General references serve as Congressional shorthand, increasing legislative consistency and efficiency. Misconstruing general references as static and bound to the state of the law at the time a statute was enacted would strip Congress of an important, frequently employed statutory tool. Numerous provisions across the U.S. Code contain references to general bodies of law that Congress intended to be dynamic references that would include subsequent changes to the referenced law.

Here, there is ample reason to believe that Congress would want the status of foreign sovereigns and international organizations to be the same in the federal courts. *See* 91 Cong. Rec. 12,432 (Dec. 20, 1945) ("[O]rganization[s] made up of a number of foreign governments, as well as our own . . . should enjoy the same status as an embassy of . . . [a foreign] government."). As petitioners argue, international organizations are created by sovereign states and "are comprised 'entirely or principally of states.'" Pet. Br. 32 (quoting Restatement (Third) of Foreign Relations Law § 221 (1987)). Foreign states act through these organizations. Accordingly, there is no

reason that international organizations should be immune to suit in cases where the states that created them are not. To do so would permit those states "to evade legal accountability merely 'by acting through international organizations.'" *Id.* at 32–33 (quoting *OSS Nokalva*, 617 F.3d at 764).

In this regard, *amici* agree wholeheartedly with the reasoning of the Third Circuit, which held that the contrary position leads to an "anomalous result":

> If a foreign government, such as Germany, had contracted with [the injured party], it would not be immune from suit because the FSIA provides that a foreign government involved in a commercial arrangement such as that in this case may be sued, as [the defendant] acknowledged at oral argument. We find no compelling reason why a group of states acting through an international organization is entitled to broader immunity than its member states enjoy when acting alone. Indeed, such a policy may create an incentive for foreign governments to evade legal obligations by acting through international organizations.

617 F.3d at 764. *See also Jam*, 860 F.3d at 710 (Pillard, J., concurring) ("Neither the IOIA nor our cases interpreting it explain why nations that collectively breach contracts or otherwise act unlawfully through organizations should enjoy immunity in our courts when the same conduct would not be immunized if directly committed by a nation acting on its own.")

Moreover, the IOIA is not the only statute where Congress has sought to ensure conformity across disparate bodies of the law by using general references. For example, Congress has directed that certain Federal Rules of Civil Procedure apply to contested cases before the Patent and Trademark Office ("PTO"). *See* 35 U.S.C. § 24 ("The provisions of the Federal Rules of Civil Procedure relating to the attendance of witnesses and to the production of documents and things shall apply to contested cases in the Patent and Trademark Office."). Confronted with the question of how to interpret the reference in § 24, then-Judge Gorsuch; writing for the Tenth Circuit, held: "So, you might ask, could it be that § 24 allows the parties to [PTO] proceedings only those powers Rule 45 specified back in 1975 rather than those it specifies today? We think not." *El Encanto, Inc. v. Hatch Chile Co., Inc.*, 825 F.3d 1161, 1164 (10th Cir. 2016) (citing Norman J. Singer & J.D. Shambie Singer, 2B Sutherland Statutory Construction § 51:8 (7th ed. 2015)).

Another area of law where Congress sought conformity with an evolving body of law was worker's compensation. Congress applied certain provisions of the Longshoremen's and Harbor Workers Compensation Act to coal mine operators. Black Lung Benefits Act, 30 U.S.C. § 932(a). When subsequent changes were made to the Longshoremen's Act, courts had to grapple with whether those changes also applied to coal mine operators. The Seventh Circuit determined that because Congress had made a general reference to the Longshoremen's Act, subsequent amendments did apply. *Dir., Off. of Workers' Compen. Programs,*

U. S. Dept. of Lab. v. Peabody Coal Co., 554 F.2d 310, 323–31 (7th Cir. 1977). Several other Courts of Appeals have followed suit and found the amendments applicable to coal mine operators. *Clark v. Crown Const. Co.*, 887 F.2d 149, 153 (8th Cir. 1989); *Dir., Off. of Workers' Compen. Programs, U.S. Dept. of Lab. v. Natl. Mines Corp.*, 554 F.2d 1267, 1273 (4th Cir. 1977); *Dir., Off. of Workers' Compen. Programs, U. S. Dept. of Lab. v. E. Coal Corp.*, 561 F.2d 632, 638 (6th Cir. 1977).

Congress also uses general references to incorporate foreign law into the U.S. Code. In criminalizing piracy, for example, Congress provided for life imprisonment for "[w]hoever, on the high seas, commits the crime of piracy *as defined by the law of nations*." 18 U.S.C. § 1651 (emphasis added). The Fourth Circuit, where many piracy prosecutions are brought due to the U.S. Navy Brig at Norfolk, has been called on to interpret the scope of that reference to international law. The Fourth Circuit "rejected the theory that the meaning of piracy for purposes of § 1651 'was fixed in the early Nineteenth Century.'" *United States v. Said*, 798 F.3d 182, 189 (4th Cir. 2015) (quoting *United States v. Dire*, 680 F.3d 446, 467 (4th Cir. 2012)). Instead, the court "concluded that '§ 1651 incorporates a definition of piracy that changes with advancements in the law of nations.'" *Id.* (quoting *Dire*, 680 F.3d at 469).

While piracy in the 1800s was defined to require a "robbery at sea," it now has a much broader meaning that includes many acts of violence on the high seas. *Dire*, 680 F.3d at 458–59, 469. Under the dated conception of piracy, many hostile acts on the

high seas would go unpunished. In *Dire,* the defendants attacked the U.S.S. Nicholas because they thought from afar that the ship was a vulnerable freighter. *Id.* at 449. Defendants argued that their acts were not piracy because in the early 1800s piracy required a "robbery." Under the current international standard for piracy, however, their acts were held to qualify as piracy because the current definition includes "[a]ny illegal acts of violence" by the crew of a private ship on the high seas against another ship. *Id.* at 458–59, 469.

Piracy law highlights the wisdom of continuing to construe general references as dynamic. Courts would have to look back more than two hundred years to the state of international law on piracy when the Act of 1790 was passed if the reference were a static one. *Id.* at 455, 458–59, 469. While that inquiry is not impossible, the divergence in law over the course of the centuries would put the United States dangerously out of step and leave many hostile acts unpunishable in the courts of the United States.

This Court also treats general references to state law as dynamic. Under the Rules of Decisions Act, 28 U.S.C. § 1652, Congress designated the "laws of the several states" as the rules of decision for civil actions in federal courts sitting in diversity. *Id.* This Court held in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 (1996) that "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." To obtain this result, of

course, requires applying the law of the state at the time of the litigation, not as it existed at the time the Rules of Decisions Act was passed.

As these examples show, viewing these general references as static would ignore Congress's intent and strip it of a sensible statutory tool that allows it to couple one body of law with another and to have them evolve in tandem. It makes sense that Congress would choose to apply a complex and highly reticulated statutory framework to related contexts. It makes *little* sense to assume that having made that choice, Congress would not want changes in one area to apply to the other, related areas. There is no reason to believe that, having made the choice to link two bodies of law, Congress would intend to allow developments in the referenced body of law to uncouple the two.

References to general bodies of law are an efficient tool to simplify complex areas of the law by coupling one to another. By contrast, reading these statutes as creating static cross-references would just increase duplication and redundancy across the Code because Congress would have to repeat the same provisions across separate sections and titles. Moreover, if general references to foreign or state law were interpreted as static, Congress would be faced with the herculean task of constantly monitoring the referenced law and constantly making changes to the U.S. Code. As such, Congress must be permitted to rely on general references to increase consistency and efficiency, just as it has in the past. And, when Congress invokes this shorthand, courts should give effect to lawmakers' intent.

CONCLUSION

For the foregoing reasons, the decision of the D.C. Circuit should be reversed.

Respectfully submitted.

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No. 17-1011

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, et al.,
Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW, ACCOUNTABILITY COUNSEL, CENTER FOR CONSTITUTIONAL RIGHTS, CENTRE FOR RESEARCH ON MULTINATIONAL CORPORATIONS, GLOBAL WITNESS, INCLUSIVE DEVELOPMENT INTERNATIONAL, INTERNATIONAL ACCOUNTABLITY PROJECT, ERICA R. GOULD, AND JENNIFER M. GREEN IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the International Organizations Immunities Act—which affords international organizations the "same immunity" from suit that foreign governments have, 22 U.S.C. § 288a(b)—confers the same immunity on such organizations as foreign governments have under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–11.

TABLE OF CONTENTS

Question Presented i

Table of Authorities iv

Interest of *Amici Curiae* 1

Summary of Argument 9

Argument 11

I. A Restrictive Theory of Immunity Would Assist International Organizations in Carrying Out Their Missions and Objectives. 15

A. Access to Courts Would Complement Independent Accountability Mechanisms by Ensuring That Complainants Can Obtain an Effective Remedy. 15

B. Access to Courts Would Also Enhance Reputation and Restore Public Image by Showing That International Organizations Are Not Above the Law. 22

II. A Restrictive Theory of Immunity Will Not Open a Floodgate of Lawsuits Against International Organizations. 25

A. There Is No Empirical Support for This Concern, As Even the IFC Itself Has Acknowledged. 25

B. Even If This Concern Were Legitimate, It Should Incentivize International Organizations to Make Accountability Mechanisms Stronger and Institutional Responses More Robust..... 29

Conclusion 32

TABLE OF AUTHORITIES

Cases

Broadbent v. Org. of American States,
628 F.2d 27 (D.C. Cir. 1980) 26

Factory at Chorzów (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No.17 (Order of Sept. 13) 23

Hassett v. Welch,
303 U.S. 303 (1938) 12

Jam v. Int'l Fin. Corp.,
172 F. Supp. 3d 104 (D.D.C. 2016) 14

Jam v. Int'l Fin. Corp.,
860 F.3d 703 (D.C. Cir. 2017) 14

New Hampshire v. Maine,
532 U.S. 742 (2001) 28

Republic of Austria v. Altmann,
541 U.S. 677 (2004) 12

Tuck v. Pan Am Health Org.,
668 F.2d 547 (D.C. Cir. 1981) 26

Verlinden B.V. v. Central Bank of Nigeria,
461 U.S. 480 (1983) 12

Statutes

22 U.S.C. § 288a(b) (2016) ..... i, 11

28 U.S.C. § 1605(a) (2016) 26

28 U.S.C. §§ 1602–11 (2016) i

Treatises

2B NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 51:7 (7th ed. Nov. 2017) 11

Other Authorities

Alnoor Ebrahim & Steve Herz, *Accountability in Complex Organizations: World Bank Responses to Civil Society* (Harv. Bus. Sch. working paper, Oct. 2007), https://hbs.me/2MailIC 17

Benjamin M. Saper, *The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective*, 44 N.Y.U. INT'L L. & POL. 1279 (2012) 17, 19

Br. Amicus Curiae Dr. Erica R. Gould, *Jam v. Int'l Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017) 18

CAITLIN DANIEL, KRISTEN GENOVESE, MARIETTE VAN HUIJSTEE & SARAH SINGH (EDS.), GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE (Amsterdam: SOMO, Jan. 2016), https://bit.ly/2vnPZ5A 17, 19, 27

CAO Cases, COMPLIANCE ADVISOR OMBUDSMAN, https://bit.ly/2vp3RfT (last visited July 31, 2018) 18, 27

Carson Young, Note, *The Limits of International Organization Immunity: An Argument for a Restrictive Theory of Immunity Under the IOIA*, 95 TEX. L. REV. 889 (2017) 20, 24

Christoph Schreuer, *The Changing Structure of International Organization*, 11 TRANSNAT'L LAW. 419 (1998) 15

Daniel D. Bradlow, *Using a Shield as a Sword: Are International Organizations Abusing Their Immunity?*, 31 TEMPLE INT'L & COMP. L.J. 45 (2017) 20

Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177 (2005) 17

Greta L. Rios & Edward P. Flaherty, *International Organization Reform or Impunity? Immunity Is the Problem*, 16 ILSA J. INT'L & COMP. L. 433 (2010) 23

INT'L FIN. CORP., IFC THE FIRST SIX DECADES (2d ed. Nov. 2016), https://bit.ly/2OvLIpj 22, 24

INT'L FIN. CORP., POLICY ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY (2012), http://bit.ly/2mJbbiR 27

INT'L FIN. CORP., THE IFC WAY DEFINING OUR CULTURE BUILDING OUR BRAND (2009), https://bit.ly/2LGqtU6 22

Kate Nancy Taylor, *Appraising the Role of the IFC and Its Independent Accountability Mechanism: Community Experiences in Haiti's Mining Sector*, 17 SUSTAINABLE L. & DEV. POL'Y 12 (2017) 17

Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53 (1995) 23

ROXANA ALTHOLZ & CHRIS SULLIVAN, ACCOUNTABILITY & INTERNATIONAL FINANCE INSTITUTIONS: COMMUNITY PERSPECTIVES ON THE WORLD BANK'S OFFICE OF THE COMPLIANCE ADVISOR OMBUDSMAN (Univ. Cal. Berkeley Sch. of Law, Int'l Human Rights Law Clinic, Mar. 2017), https://bit.ly/2mHGzjC 16

Rutsel Silvestre J. Martha, *International Financial Institutions and Claims of Private Parties: Immunity Obliges*, *in* 3 THE WORLD BANK LEGAL REVIEW: INTERNATIONAL FINANCIAL INSTITUTIONS AND GLOBAL LEGAL GOVERNANCE 93 (Hassane Cissé et al. eds., 2012) 30

THE CAO AT 10: ANNUAL REPORT FY2010 AND REVIEW FY2000–10 (2010), https://bit.ly/2M7gXph 18

William E. Holder, *Can International Organizations Be Controlled? Accountability and Responsibility*, 97 PROCEEDINGS OF THE ANNUAL MEETING (AM. SOC'Y OF INT'L L.) 231 (2003) 16

INTEREST OF *AMICI CURIAE*[1]

Since 1989, the **Center for International Environmental Law (CIEL)** has used the rule of law to protect the environment, promote human rights, and ensure a just and sustainable society. In fulfilling its mission to protect the environment and communities against the adverse impacts of development CIEL was instrumental in creating the Inspection Panel at the World Bank, as the first accountability mechanism within a development finance institution. In subsequent years CIEL has worked to strengthen safeguard policies and accountability mechanisms globally. CIEL provides assistance and accompaniment of people and communities who seek redress for harms caused by development projects by filing complaints at these mechanisms. Currently, CIEL supports communities from Colombia, Chile, Panama, and Nicaragua in their cases at independent accountability mechanisms, three of which are at the IFC's mechanism the

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of briefs from any *amicus curiae* on the merits of this case.

Compliance Advisor Ombudsman. CIEL's research and advocacy at international institutions is solidified with collaborations on reports such as GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE.

Accountability Counsel amplifies the voices of communities around the world to protect their human rights and environment. As advocates for people harmed by internationally financed projects, Accountability Counsel employs community driven and policy level strategies to access justice. For the past decade, Accountability Counsel has supported people in over 40 communities around the world in their complaints about the human rights and environmental abuses of international organizations. Among these are four complaints to the IFC's Compliance Advisor Ombudsman. Accountability Counsel's policy advocacy focuses on enhancing the policy and practice of non-judicial accountability mechanisms, with deep expertise in the CAO, and the IFC response to CAO cases. Through its research program, Accountability Counsel co-authored the joint report GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE and has documented the 1,300 complaints filed to non-judicial accountability mechanisms over the past 25 years, analyzing them for trends and best practice. Through Accountability Counsel's case support, policy

advocacy and research across these mechanisms, the organization has seen the CAO as a leader in delivering fair accountability processes in recent years, with repeated poor responses from the IFC that result in lack of remedy for complainants.

The Center for Constitutional Rights (CCR) is a non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Since its founding in 1966 out of the civil rights movement, CCR has a long history of litigating cases on behalf of those with the fewest protections and least access to legal resources. CCR brought the landmark case that, for the first time in the modern era, recognized claims under the Alien Tort Statute to remedy human rights violations, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), a decision ultimately endorsed by this Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and brought cases that recognized that the ATS applies to non-state actors, *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), *cert denied*, 518 U.S. 1005 (1996), and to corporations, *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *dismissed by stipulation pending reh'g en banc*, 403 F.3d 708 (9th Cir 2005), including U.S. corporations that comport with this Court's decisions in *Kiobel v Royal Dutch Petroleum Co.*, No. 10-1491, and *Jesner v.*

Arab Bank, No. 16-499. *See Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516 (4th Cir. 2014); *Al Shimari v. CACI Premier Tech., Inc.*, No. 1:08-cv-827, 2018 WL 3118183 (E.D. Va. June 25, 2018). CCR also filed the first *habeas corpus* petitions on behalf of foreign nationals detained by the Executive without counsel, charge or trial, at the U.S. Naval Station at Guantánamo Bay, Cuba—petitions that have twice reached this Court. See *Rasul v. Bush*, 542 U.S. 466 (2004); *Boumediene v. Bush*, 553 U.S. 723, 769 (2008). CCR regularly engages with various international human rights institutions and mechanisms, including the United Nations treaty review process, the Inter-American Commission on Human Rights, and various nation-states' universal jurisdiction statutes to advance accountability and right to a remedy for victims of international human rights violations.

The **Centre for Research on Multinational Corporations** (in Dutch, *Stichting Onderzoek Multinationale Ondernemingen* or SOMO) is a non-profit organization based in Amsterdam, The Netherlands. SOMO envisions a global economic, political and legal system in which civil society has the power to hold multinational corporations and governments to account for destructive and unfair business practices, and the power to realise economic alternatives, locally and globally. Since 1973, SOMO

has investigated multinational corporations and the impact of their activities on people and the environment. When workers or communities feel they have been adversely affected by corporate activity, we support them in accessing non-judicial grievance mechanisms, including the independent accountability mechanisms of development finance institutions. SOMO also led the joint research initiative that resulted in the 2016 publication of GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE, which found that development banks themselves undermine the effectiveness of their own complaint mechanisms by limiting their mandate and failing to uphold their own responsibilities in the complaint process.

Global Witness advocates to end environmental and human rights abuses driven by the exploitation of natural resources and corruption in the global political and economic system. We have been pioneers in uncovering and exposing the links between corruption, conflict and human rights and environmental abuses. We use our exposes to fight for genuine accountability for governments, companies and individuals, where they have been responsible for injustice. We believe that international organisations, including the International Finance Corporation, should be equally accountable for their actions.

Inclusive Development International (IDI) is a human rights organization working to make the international economic system more just and inclusive. We support and build the capacity of local organizations and affected communities to defend their land, environment and human rights in the face of harmful investment and development projects, including through both judicial remedies and non-judicial grievance mechanisms. Through research, casework and policy advocacy, IDI works to strengthen the human rights regulation and accountability of corporations, financial institutions and development agencies. IDI's policy research and advocacy focuses on improving environmental and human rights due diligence processes of private investors, financiers and multilateral development banks and on advancing the right to effective remedy when harms occur. IDI's research has highlighted widespread and systemic flaws in the IFC's approach to environmental and social due diligence and supervision in its financial sector investments, which make up over half of the institution's total portfolio. IDI also collaborated on the joint report GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE. Since 2012, IDI has advised and supported dozens of communities in Asia and Africa in complaints to the CAO against the IFC and its corporate clients.

For 13 years, **International Accountability Project** has supported communities adversely impacted by development projects to assert their human and environmental rights and to identify processes with the greatest impact to improve people's ability to shape their own development and provide remedies when rights are violated. International Accountability Project has advocated to create openings at influential decision-making spaces at international financial institutions, such as the World Bank Group, to advance development principles and projects that prioritize human and environmental rights. Pertinent to the instant matter, we have worked with communities adversely impacted by International Finance Corporation projects through various stages of the project cycle, assisting communities to: obtain critical project information that could impact their lives, improve the design of a project, and mitigate, or wholly avoid, environmental and human rights risks; document and amplify concerns about existing and future project harms; raise awareness of existing avenues for recourse; and provide technical and strategic support in complaint process before the Compliance Advisor Ombudsman.

Dr. **Erica R. Gould**, PhD, has substantial professional interest in the issues addressed in this brief, and these issues fall within her area of

expertise. Dr. Gould is the director of the International Relations Honors Program and a Lecturer in International Relations and International Policy Studies at Stanford University. She has previously served as an Assistant Professor at the University Virginia and a Visiting Assistant Professor at Johns Hopkins University. For over ten years, she has taught undergraduate and graduate-level courses on international organizations at the University of Virginia, Johns Hopkins University, and Stanford University. Dr. Gould is a political scientist and an expert on international organizations. In particular, she has studied international financial institutions extensively, and conducts research on mechanisms of control of international organizations. Her numerous publications include MONEY TALKS: THE INTERNATIONAL MONETARY FUND, CONDITIONALITY AND SUPPLEMENTARY FINANCIERS (2006). In addition to her research and teaching expertise, Dr. Gould also serves on the Board and Strategy Committee of Accountability Counsel, a San Francisco-based nonprofit organization. She submitted an amicus brief in support of the Petitioners in the United States Court of Appeals for the District of Columbia Circuit.

Jennifer M. Green is an Associate Professor at the University of Minnesota where she directs and teaches the Law School's Human Rights Litigation and International Legal Advocacy Clinic and a

seminar on Business and Human Rights. She has two decades of experience working on questions of accountability and remedies for alleged human rights violators both in the U.S. courts and in international fora such as international criminal tribunals, and the United Nations and Inter-American human rights systems. She was counsel for amicus Erica Gould in support of Petitioners in the United States Court of Appeals for the District of Columbia Circuit.

SUMMARY OF ARGUMENT

The International Organizations Immunities Act (IOIA) should be construed as conferring the same immunity that foreign governments have under the Foreign Sovereign Immunities Act (FSIA)—namely, a "restrictive theory" of sovereign immunity under which public international organizations are immune from suits relating to acts of a governmental nature, but not those relating to commercial activities. The very purpose of immunity is to aid an international organization in effectively pursuing and achieving its stated mission and objectives. Some international organizations expressly address the nature and scope of their immunity in their charters. For those that do not, the IOIA provides a set of default rules regarding immunity. These default rules should be interpreted and applied in a manner that advances

the work that international organizations do in their respective domains.

Specifically, applying a restrictive theory of immunity to the IOIA will increase the accountability of international organizations to the various nonstate persons and entities with whom they interact in their work. Independent accountability mechanisms (sometimes abbreviated IAMs) currently in place for international financial institutions (IFIs) like the International Finance Corporation (IFC), the Respondent, to address complaints and grievances have been criticized for failing to elicit an institutional response that offers most complainants an effective remedy. A restrictive theory of immunity would counter that criticism by ensuring that U.S. courts are accessible to provide redress, particularly for those parties adversely impacted by an international organization's commercial activities, stemming from, for example, environmental damage or human rights abuse. It would also enhance an international organization's reputation and public image by sending a message that the organization does not consider itself to be above the law.

Moreover, ensuring that the courts are accessible to parties who have been adversely impacted by an international organization's commercial activities would not open a floodgate of lawsuits that threaten

to disrupt the organization's operations, sap its resources, and derail its mission. First, there is no empirical evidence to support such a concern and, indeed, even the IFC has taken the opposite view at the petition stage. Second, and more importantly, even the Respondent's IAM, with a lower barrier-to-entry than the courts, has not experienced a "flood" of cases. Opening up an avenue of legal recourse with a higher barrier-to-entry—namely, the U.S. courts—to a subset of complainants with claims falling outside the scope of an international organization's immunity will not result in a flood either.

ARGUMENT

Amici agree with the Petitioners that, as a matter of statutory construction, the IOIA's grant to international organizations of "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments," 22 U.S.C. § 288a(b), should have the same scope as the immunity granted to foreign governments under the FSIA. The quoted statutory text demonstrates that the IOIA is a "general reference" statute, which incorporates any subsequent changes in the referenced body of law on foreign sovereign immunity, including the passage of the FSIA. 2B NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 51:7 (7th ed. Nov. 2017)

(distinguishing a specific reference statute that "refers specifically to a particular statute by its title or section number" and does not include subsequent amendments to the referenced statute, from a general reference statute that "refers to the law on a subject generally" and "includes subsequent amendments"); *Hassett v. Welch*, 303 U.S. 303, 314 & n.17 (1938) (applying the "reference" canon to a specific reference statute). And as the Court has held repeatedly, the FSIA's scope is one of restrictive immunity, not absolute immunity. *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).

Amici write separately to point out that the application of a restrictive theory of immunity would assist international organizations in carrying out their stated missions and objectives. As recounted in Part I.A *infra*, the IFC and other IFIs have instituted IAMs that are intended to investigate and resolve complaints and grievances relating to their operations and activities. Practice and time, however, have exposed certain shortcomings associated with the institution's response to these mechanisms, and critics have pointed out that what's often lacking is an effective remedy. In the face of such criticism, applying the longstanding restrictive theory of immunity would give complainants access

to U.S. courts and a legitimate opportunity to obtain an effective remedy in cases where non-judicial accountability processes fail to yield a satisfactory resolution or any resolution at all.

Furthermore, applying a restrictive theory of immunity would not only complement an international organization's accountability mechanism but also enhance its reputation and improve its public image. As discussed in Part I.B *infra*, a claim of absolute immunity creates a negative impression among the public that the organization sees itself as above the law. That impression can breed mistrust and skepticism of the organization's operations and activities, thus making its mission more difficult—and runs contrary to principles of international law recognizing a right to a remedy. Applying a restrictive theory of immunity would help repair and restore an international organization's public image by sending a strong message that even an international organization may be held to answer in a court of law, particularly for claims and disputes arising out of its commercial activities.

Amici also write to allay concerns that the application of a restrictive theory of immunity will open a floodgate of litigation against international organizations, plaguing them with innumerable lawsuits that cripple their operations or prevent

them from carrying out their stated missions. *See Jam v. Int'l Fin. Corp.*, 860 F.3d 703, 708 (D.C. Cir. 2017), Pet. App. 11a ("Appellee's suggestion that the floodgates would be open does not seem an exaggeration."); *Jam v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104, 110–11 (D.D.C. 2016), Pet. App. 34a (expressing a concern that a waiver of immunity would open "a floodgate of lawsuits by allegedly aggrieved complainants from all over the world" (quoting the IFC's reply brief on its motion to dismiss)). As pointed out in Part II.A *infra*, such concerns lack any empirical support. What's more, the IFC has expressed the opposite view at the petition stage.

In any event, such concerns, if warranted, should only incentivize international organizations to make their IAMs more robust and the institutions more responsive to the mechanisms' findings and recommendations. As addressed in Part II.B *infra*, international organizations can exert some measure of control over the number of complaints that end up in litigation. They can provide alternative processes for dispute resolution that involve third-party neutrals as opposed to judges. They may be able to craft alternative forms of relief that do not require judicial supervision or enforcement.

I. A RESTRICTIVE THEORY OF IMMUNITY WOULD ASSIST INTERNATIONAL ORGANIZATIONS IN CARRYING OUT THEIR MISSIONS AND OBJECTIVES.

A. Access to Courts Would Complement Independent Accountability Mechanisms by Ensuring That Complainants Can Obtain an Effective Remedy.

1. Since the end of the Second World War, international organizations have matured as public institutions and autonomous international actors, and proliferated in number to occupy a diverse set of domains, some of which traditionally were occupied by governments and others that were not. According to one scholar, the trend is one of "[i]nternational organizations ... increasingly taking over functions that were traditionally reserved to States. This assumption of functional statehood is incremental and spread over a variety of issues, such as treaty making, functional recognition of newcomers into the international community, public services, economic regulation, peace and security, lawmaking, adjudication, and protection of individuals." Christoph Schreuer, *The Changing Structure of International Organization*, 11 TRANSNAT'L LAW. 419, 421 (1998). Another scholar has remarked that "[i]nternational (i.e., intergovernmental) organizations have become

a staple of the international legal system. Their creation, maintenance, and support stem from the unrelenting realities of international interaction and interdependence and the realization that nation-states can achieve better value outcomes acting collectively rather than alone." William E. Holder, *Can International Organizations Be Controlled? Accountability and Responsibility*, 97 PROCEEDINGS OF THE ANNUAL MEETING (AM. SOC'Y OF INT'L L.) 231, 231 (2003).

Given the various state functions that international organizations have taken over, and the immense international reach and substantial political influence that they exert, their accountability to the communities and peoples that they are supposed to benefit has been a subject of continuing interest and concern. In particular, the IFC and other IFIs have received considerable attention and scrutiny regarding their accountability to parties adversely impacted by the projects they finance. *See, e.g.*, ROXANA ALTHOLZ & CHRIS SULLIVAN, ACCOUNTABILITY & INTERNATIONAL FINANCE INSTITUTIONS: COMMUNITY PERSPECTIVES ON THE WORLD BANK'S OFFICE OF THE COMPLIANCE ADVISOR OMBUDSMAN (Univ. Cal. Berkeley Sch. of Law, Int'l Human Rights Law Clinic, Mar. 2017), https://bit.ly/2mHGzjC; Kate Nancy Taylor, *Appraising the Role of the IFC and Its Independent*

Accountability Mechanism: Community Experiences in Haiti's Mining Sector, 17 SUSTAINABLE L. & DEV. POL'Y 12 (2017); CAITLIN DANIEL, KRISTEN GENOVESE, MARIETTE VAN HUIJSTEE & SARAH SINGH (EDS.), GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE (Amsterdam: SOMO, Jan. 2016), https://bit.ly/2vnPZ5A; Benjamin M. Saper, *The International Finance Corporation's Compliance Advisor/Ombudsman (CAO): An Examination of Accountability and Effectiveness from a Global Administrative Law Perspective*, 44 N.Y.U. INT'L L. & POL. 1279 (2012); Alnoor Ebrahim & Steve Herz, *Accountability in Complex Organizations: World Bank Responses to Civil Society* (Harv. Bus. Sch. working paper, Oct. 2007), https://hbs.me/2MaillC; Eisuke Suzuki & Suresh Nanwani, *Responsibility of International Organizations: The Accountability Mechanisms of Multilateral Development Banks*, 27 MICH. J. INT'L L. 177 (2005).

The World Bank Group set up an Office of the Compliance Advisor Ombudsman (CAO) in 1999 in response to pressure about the lack of jurisdiction of its Inspection Panel. As constituted, the CAO receives complaints related to IFC and Multilateral Investment Guarantee Agency (MIGA) projects whereas the Inspection Panel receives complaints related only to the activities of the World Bank Group's public-sector institutions (i.e., the Interna-

tional Bank for Reconstruction and Development and the International Development Association). The CAO's first case addressed dissatisfaction among the Pehuenche people regarding their resettlement as a result of the Pangue Ralco Dam Project in Chile. *See* THE CAO AT 10: ANNUAL REPORT FY2010 AND REVIEW FY2000–10 18–19 (2010), https://bit.ly/2M7gXph.

Over nearly two decades, the CAO has thus provided a mechanism for parties to raise claims of harm to an independent entity designed to investigate and evaluate such claims, free of influence by the operational staff at the IFC. From its establishment 18 years ago to date, the CAO has registered only 178 complaints. CAO Cases, COMPLIANCE ADVISOR OMBUDSMAN, https://bit.ly/2vp3RfT (last visited July 31, 2018). According to Dr. Erica Gould, the number of projects for which complaints were registered with the CAO (155 in FY2001–15) is but a small fraction (less than 3%) of the total projects that the IFC financed during that same time period (5702). *See* Br. Amicus Curiae Dr. Erica R. Gould at 21–24, *Jam v. Int'l Fin. Corp.*, 860 F.3d 703 (D.C. Cir. 2017).

And importantly, in this case, litigation resulted only when the Petitioners concluded that the CAO process was ineffectual because the IFC was largely rejecting the CAO's findings and failing to take

corrective steps. When this avenue failed, litigation became the only option to restore the legitimacy of the institution's operations.

The Petitioners' experience with the CAO process accords with the findings of practitioners, including many of the *amici*, and scholars who have assessed how well the IFC is addressing CAO-registered complaints relating to its operations and activities. First, practitioners note that IAMs:

> make up only half of the accountability system.... The [IFI's] management also plays a critical role in the system by, inter alia, responding to the [mechanism's] findings, consulting with complainants ... on the development of an action plan to address instances of non-compliance, and applying lessons learned from cases to future projects. The system only functions if both halves of the [accountability framework] work and work well.

CAITLIN DANIEL ET AL., *supra*, at 17–18.

Second, the CAO, as currently constituted, lacks the power to hold the IFC accountable and to grant complainants an effective remedy. *See* Saper, *supra*, at 1325 ("The procedural measures [within the CAO]

alone, however, without some 'hard' force, are insufficient to allow project-affected people to hold the IFC/MIGA accountable[.]"); *see also* Daniel D. Bradlow, *Using a Shield as a Sword: Are International Organizations Abusing Their Immunity?*, 31 TEMPLE INT'L & COMP. L.J. 45, 67 (2017) ("[I]t is not assured that the [World Bank Group's accountability mechanisms] can provide the complainants with a meaningful remedy because they only have investigatory and/or advisory powers, and their findings and recommendations are nonbinding."); Carson Young, Note, *The Limits of International Organization Immunity: An Argument for a Restrictive Theory of Immunity Under the IOIA*, 95 TEX. L. REV. 889, 907 (2017) (noting that accountability mechanisms fail to produce enforceable judgments and therefore fail to guarantee any remedial or corrective measures).

Both a functional, non-judicial complaint-investigation/resolution framework and a restrictive theory of immunity under the IOIA that allows for some litigation should be cornerstone features of the accountability framework of international organizations, including the Respondent. They function not as alternatives, but as complements, and at times can serve distinct purposes. Independent accountability mechanisms of international organizations, including the CAO, provide an avenue for communities to

submit complaints and have them addressed through various means, including dispute resolution (a broad term that encompasses a variety of approaches that are frequently employed: facilitation an[illegible]ormation sharing, joint fact-finding, dialogue and negotiation, mediation and conciliation) and compliance. Affected individuals or communities may not choose to litigate if the CAO, in this instance, could provide a forum for addressing the dispute with less cost, shorter timeframes for resolution, and a lower barrier-to-entry. And these individuals or communities ultimately may have no reason to litigate against the Respondent if the CAO process results in the IFC effectively addressing their concerns.

Furthermore, there may be instances where, as here, the CAO is unable to ensure that the IFC effectively redresses the concerns raised by the individuals or communities. In such cases, a restrictive theory of immunity would help promote the Respondent's accountability and legitimacy. Certainly, the IFC's long-term interests are served by deterring environmental and social abuses, through both its independent accountability mechanism and potential litigation, so that the organization operates in a legitimate, law-abiding, and responsible way. *See* INT'L FIN. CORP., IFC THE FIRST SIX DECADES 91 (2d ed. Nov. 2016) (stressing that "the lessons from [the Pangue Ralco Dam

Project in Chile] and other projects proved invaluable, leading to improved environmental and social guidelines that became standard practice not just for IFC, but for the global commercial banking industry as a whole"), https://bit.ly/2OvLIpj; INT'L FIN. CORP., THE IFC WAY DEFINING OUR CULTURE BUILDING OUR BRAND 4 (2009) (reciting as a corporate value, *We do what we say we will do, and we hold ourselves accountable*), https://bit.ly/2LGqtU6.

Given the broad missions that they undertake and the many peoples and communities that they impact, international organizations should have every reason to address complaints and grievances relating to operations and activities through an internal system with an independent accountability mechanism like the CAO, and through the judicial system when necessary and appropriate, under a restrictive theory of immunity.

B. Access to Courts Would Also Enhance Reputation and Restore Public Image by Showing That International Organizations Are Not Above the Law.

A negative byproduct of absolute immunity is the development of a perception that international organizations, and the people who staff them, are above the law. *See, e.g.*, Greta L. Rios & Edward P.

Flaherty, *International Organization Reform or Impunity? Immunity Is the Problem*, 16 ILSA J. INT'L & COMP. L. 433, 454–55 (2010) ("Immunities may at first glance seem beneficial to the UN and other international organizations but may ultimately prove counterproductive. One should consider that the vast immunities of these organizations will give the impression that they can get away with abusing the very principles for which they were created to promote."); Michael Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT'L L. 53, 88–89 (1995) (observing that "the price of fostering corporate identity within an enterprise favored with privileges and immunities may be that some staff members will develop an arrogant sense of being above all law").[2]

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[2] Such claims of absolute immunity run contrary to the fundamental principle of a right to a remedy enshrined in international law. *See, e.g.*, *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No.17, at 29 (Order of Sept. 13) ("[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."); Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

And when these organizations in fact ignore the public findings and recommendations of their independent accountability mechanisms, their reputation and public image sustain significant damage as a result. That only breeds mistrust and skepticism within affected communities about an organization's agenda and motives, which ultimately hinders or even jeopardizes its mission.

A restrictive theory of immunity would help restore an international organization's reputation and public image. Young, *supra*, at 907 (concluding that "the increased accountability that would flow from less immunity could potentially increase public approval of international organizations"). "Better public perception would clearly benefit organizational goals by providing increased influence, cooperation, and political support." *Id.* These observations squarely apply to the IFC, which has developed and touted a brand that has included the taglines, *Creating opportunity for people to escape poverty and improve their lives*, and *Creating opportunity where it's needed most.* IFC THE FIRST SIX DECADES, *supra*, at 17.

II. A Restrictive Theory of Immunity Will Not Open a Floodgate of Lawsuits Against International Organizations.

A. There Is No Empirical Support for This Concern, As Even the IFC Itself Has Acknowledged.

1. Both the district court and the court of appeals acknowledged a concern raised by the IFC that permitting the Petitioners' lawsuit to go forward "would potentially open a floodgate of lawsuits by allegedly aggrieved complainants from all over the world." Def.'s Reply at 10. *See* Pet. App. 34a (district court) ("Since this type of suit is aimed at IFC's internal decisionmaking process, the Court has little reason to doubt IFC's assessment of its concerns."); Pet. App. 11a (court of appeals) ("Should appellants' suit be permitted, every loan the IFC makes to fund projects in developing countries could be the subject of a suit in Washington. Appellee's suggestion that the floodgates would be open does not seem an exaggeration."). *Amici* are unaware of any empirical support for this concern, and none appears in the record.

Even under a restrictive theory of immunity, lawsuits against international organizations more than likely will be quite rare. Such lawsuits, depending on their nature and type, may have to

overcome several procedural and substantive hurdles, one of which almost certainly will be whether the action falls within the commercial-activity exception (or another stated exception) to sovereign immunity. *See* 28 U.S.C. § 1605(a) (2016). Case law has shown that employment-related disputes, for example, can meet with difficulty in satisfying the FSIA's commercial-activity exception. *See, e.g., Tuck v. Pan Am Health Org.*, 668 F.2d 547, 550 (D.C. Cir. 1981) (holding that the health organization's supervision of its personnel and provision/allocation of office space did not constitute commercial activity); *Broadbent v. Org. of American States*, 628 F.2d 27, 35–36 (D.C. Cir. 1980) (holding that employment disputes between an international organization and its internal administrative staff are noncommercial in nature, and hence outside the scope of the commercial-activity exception).

Additionally, potential plaintiffs like the Petitioners do not necessarily have access to a pool of legal and expert knowledge, awareness of available options, and financial resources needed to wage complex and expensive litigation. Additional hurdles to accessing the courts as would-be litigants include language and literacy barriers. Indeed, these barriers-to-entry exist even for non-judicial accountability mechanisms like the CAO, which as noted above, have not faced a flood of cases. CAO

Cases, COMPLIANCE ADVISOR OMBUDSMAN, http://www.cao-ombudsman.org/cases/default.aspx (last visited July 31, 2018); *see* CAITLIN DANIEL ET AL., *supra*, at 56–58 (discussing barriers to accessibility of non-judicial accountability mechanisms). Accordingly, there is no empirical basis to fear an opening floodgate of litigation from plaintiffs like the Petitioners. The Court should not give any credence to such a concern.

What's ironic about the Respondent's flood-of-litigation argument is that it seems to be worried about lawsuits from the very individuals and communities whom it is intended to benefit. As the IFC states, its mission is "to further economic development" and "fight poverty" around the world with the "intent to 'do no harm' to people and the environment." Pet. App. 3a, 24a; INT'L FIN. CORP., POLICY ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 2 (2012), http://bit.ly/2mJbbiR. Addressing concerns voiced by individuals and communities and redressing their harms, whether through the CAO or in the courts, will help the IFC fulfill its mission.

2. Although the IFC originally voiced a concern about opening a floodgate of litigation, it has since indicated that it isn't concerned that the application of a restrictive theory of immunity necessarily will

lead to more litigation. In opposing the Court's grant of a writ, the IFC flatly asserted that "[n]ot only are suits against international organizations *uncommon*, but also they frequently do not even involve the application of the IOIA. Further, in nearly all of them, the international organization would *enjoy immunity from suit even under the restrictive theory* adopted by the Third Circuit." Resp.'s Pet. Opp. Br. at 3 (emphases added). *See also id.* at 15 (asserting that "the suits brought against such organizations often would not fall within any of the FSIA's stated exceptions to immunity, even if the FSIA applied").

The IFC's current position couldn't be any clearer regarding the unlikelihood of increased lawsuits under a restrictive theory of immunity, and the Court should accept its statement as one more reason not to be concerned that a ruling for the Petitioners would open a floodgate of litigation. Of course, because the IFC didn't succeed in persuading the Court to deny certiorari, it presumably isn't judicially estopped from changing its view at the merits stage. *See New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001). But it would be exceedingly awkward and peculiar for the IFC to brush off lawsuits against international organizations as "uncommon" and assert confidently that it would be immune from suit "even under the restrictive theory," only then to turn around and

urge the opposite conclusion. The IFC should be held to account for any further flip-flopping.

B. Even If This Concern Were Legitimate, It Should Incentivize International Organizations to Make Accountability Mechanisms Stronger and Institutional Responses More Robust.

1. Assuming that the concern about a restrictive theory of immunity opening a floodgate of lawsuits is legitimate, international organizations can ameliorate that concern by revising their non-judicial accountability mechanisms so that the institutions respond to complaints and grievances more fully.

If IFIs want to avoid complaints ending up in the courts, then they can strengthen the power of their non-judicial, independent accountability mechanisms and the institutional responses to their findings. International organizations have various options at their disposal to investigate and resolve complaints and grievances without litigation. As was the case here, if an international organization is willing to address promptly and proactively the instances of noncompliance identified by its independent accountability mechanism, then litigation may not be necessary. *See* Pet. App. 27a–28a (recounting the fact that the IFC failed to respond to the CAO's compliance findings with an effective action plan).

2. Some commentators have argued that the IFC and other international organizations have a "duty to establish a dispute settlement mechanism to handle complaints of private parties" because they claim to enjoy absolute immunity from suit. Rutsel Silvestre J. Martha, *International Financial Institutions and Claims of Private Parties: Immunity Obliges*, *in* 3 THE WORLD BANK LEGAL REVIEW: INTERNATIONAL FINANCIAL INSTITUTIONS AND GLOBAL LEGAL GOVERNANCE 93, 131 (Hassane Cissé et al. eds., 2012). *Amici* submit that as long as international organizations are permitted to invoke absolute immunity to shield their actions, regardless of whether they are of a governmental or commercial nature, there likely will be little incentive on their part to ensure that accountability mechanisms and other measures provide relief to parties adversely affected by their activities. Knowing that complainants have no recourse in the courts, international organizations are likely to respond however they see fit, as the IFC did in this case, to the findings and recommendations of their respective IAMs, in this case the CAO. Accordingly, if the court of appeals' interpretation of the IOIA is allowed to stand, complainants will encounter even longer odds of receiving any kind of resolution or redress for the transgressions they have suffered.

By contrast, a restrictive theory of immunity will appropriately incentivize international organizations to ensure that their accountability mechanisms and related measures in fact provide effective remedies to adversely affected parties. If international organizations face the unappealing prospect of being haled into a U.S. court for noncompliant behavior, they will make reasonable efforts to resolve complaints and grievances before litigation becomes necessary. That will only redound to the benefit of the communities and peoples that these organizations are meant to help, and thus ultimately to the organizations themselves.

* * *

For the foregoing reasons, the application of a restrictive theory of immunity to the IOIA is unlikely to subject international organizations to more lawsuits than they currently face. If anything, they will be motivated to minimize the potential number of lawsuits by ensuring greater compliance with their own policies, procedures, and objectives, and providing effective relief in response to the findings of their independent accountability mechanisms.

CONCLUSION

The judgment of the Court of Appeals for the D.C. Circuit should be reversed.

Respectfully submitted,

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No. 17-1011

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BRIEF FOR AMICI CURIAE FORMER EXECUTIVE BRANCH ATTORNEYS IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

ARGUMENT 5

I. UNLIKE SOVEREIGN IMMUNITY, IO IMMUNITY EXISTS TO ADVANCE THE UNITED STATES' FOREIGN POLICY INTERESTS 5

II. PETITIONERS' VIEW INVITES UNDUE INTERFERENCE IN SENSITIVE MATTERS OF FOREIGN POLICY 11

III. THE FSIA REFLECTS NO INTENTION TO ALTER EITHER THE EXECUTIVE'S ROLE UNDER THE IOIA OR THE IMMUNITIES THE ACT SETS FORTH 15

A. The IOIA Vests in the President—Not the Courts—The Power To Limit The Immunity Of IOs 16

B. The FSIA Does Not Silently Reduce IO Immunity Or Revoke The President's Power To Tailor That Immunity 19

IV. NEITHER PETITIONERS NOR THEIR AMICI OFFER A JUSTIFICATION FOR REJECTING THE D.C. CIRCUIT'S LONGSTANDING RULE 24

TABLE OF CONTENTS—Continued

Page

A. "Deference" To The Executive Branch Is Unnecessary Where, As Here, The Court Of Appeals' Rule Affords The President Discretion To Enact His Preferred View 24

B. Neither Congress Nor The Executive Branch Has Consistently Endorsed Petitioners' View 26

C. The Supposed Practical Problems The United States Invokes Have Not Appeared In The 35 Years Since *Mendaro* Or The 20 Years Since *Atkinson* 31

CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

CASES:

Am. Ins. Ass'n v. *Garamendi*, 539 U.S. 396 (2003) 15

Atkinson v. *Inter-American Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998) ..... *passim*

Bolivarian Republic of Venezuela v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (May 1, 2017) 6

Branch v. *Smith*, 538 U.S. 254 (2003) 21

Broadbent v. *Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) 14

Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 6

Garb v. *Republic of Poland*, 440 F.3d 579 (2d Cir. 2006) 6

INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 26

Kiobel v. *Royal Dutch Petrol. Co.*, 569 U.S. 108 (2013) 24, 30

Lutcher S.A. Celulose e Papel v. *Inter-American Dev. Bank*, 382 F.2d 454 (D.C. Cir. 1967) 22

Mathews v. *Diaz*, 426 U.S. 67 (1976) 11

Mendaro v. *World Bank*, 717 F.2d 610 (D.C. Cir. 1983) ..... *passim*

Microsoft Corp. v. *AT&T Corp.*, 550 U.S. 437 (2007) 14

Morrison v. *Nat'l Australia Bank, Ltd.*, 561 U.S. 247 (2010) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Munaf v. *Geren*, 553 U.S. 674 (2008) 13

OSS Nokalva, Inc. v. *European Space Agency*, 617 F.3d 756 (3d Cir. 2010) 32

Republic of Austria v. *Altmann*, 541 U.S. 677 (2004) 21

Republic of Argentina v. *Weltover*, 504 U.S. 607 (1992) 32

Republic of Iraq v. *Beaty*, 556 U.S. 848 (2009) 20, 25

Sale v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) 20

Samantar v. *Yousuf*, 560 U.S. 305 (2010) 15, 21

Saudi Arabia v. *Nelson*, 507 U.S. 349 (1993) 31, 32

Soucheray v. *Corps of Eng'rs of U.S. Army*, 483 F. Supp. 352 (W.D. Wis. 1979) 22

Verlinden B.V. v. *Cent. Bank of Nigeria*, 461 U.S. 480 (1983) 15, 21

STATUTES:

19 U.S.C. § 3511 30

22 U.S.C. § 288 ..... *passim*

22 U.S.C. § 288a 15, 33

22 U.S.C. § 288f 7

22 U.S.C. § 288f-l 7

28 U.S.C. § 1603 19

TABLE OF AUTHORITIES—Continued

Page(s)

TREATIES AND INTERNATIONAL SOURCES:

Articles of Agreement of the Int'l Fin. Corp., *entered into force* July 20, 1956, 7 U.S.C. 2197, T.I.A.S. No. 3620. 14

Convention on the Privileges and Immunities of the Specialized Agencies, *entered into force* Dec. 2, 1948, 33 U.N.T.S. 261 31

Marrakesh Agreement Establishing the World Trade Organization, *entered into force* Jan. 1, 1995, 1867 U.N.T.S. 154 30

LEGISLATIVE AND EXECUTIVE MATERIALS:

91 Cong. Rec. 10,866 (1945) 7

Exec. Order No. 11,718, 38 Fed. Reg. 12,797 (May 16, 1973) 18

Exec. Order No. 12,359, 47 Fed. Reg. 17,791 (Apr. 22, 1982) 18

Exec. Order No. 12,425, 48 Fed. Reg. 28069 (June 16, 1983) 18

Exec. Order No. 13,524, 74 Fed. Reg. 67803 (Dec. 16, 2009) 18

H.R. Rep. No. 79-1203 (1945) 7, 18

H.R. Rep. No. 94-1487 (1976) 20, 22

OTHER AUTHORITIES:

Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal For Reform of United States Law*, 44 N.Y.U. L. Rev. 901 (1969) 22

TABLE OF AUTHORITIES—Continued

Page(s)

Br. for the United States as Amicus Curiae, *Broadbent* v. *Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465) 27

Br. for the United States as Amicus Curiae, *Corrinet* v. *United Nations*, No. 96-17130 (9th Cir. Mar. 12, 1997), 1997 WL 33702375 27

Br. for the United States as Amicus Curiae, *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463 (2d Cir. 2006) (No. 06-403) 19, 26

Br. for the United States as Amicus Curiae, *Taiwan* v. *U.S. Dist. Ct. for the N. Dist. of Cal.*, 128 F.3d 712 (9th Cir. 1997) (No. 97-70375), 1997 WL 33555046 27

Br. for the United States as Intervenor, *Veiga* v. *WMO*, 368 F. App'x 189 (2d Cir. May 1, 2009) (No. 08-3999-cv), 2009 WL 8186687 27

G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1 (1999) 19

Gunnar Skirbekk & Nils Gilje, *A History of Western Thought: From Ancient Greece to the Twentieth Century* (7th ed. 2001) 5

Int'l Fin. Corp., *Overview* (https://tinyurl.com/ybwfn6g4) 3

TABLE OF AUTHORITIES—Continued

Page(s)

Letter from Detlev F. Vagts, Office of the Legal Adviser, to Robert M. Carswell, Jr., OAS (Mar. 24, 1977) 23

Letter from Roberts B. Owen, State Department Legal Adviser, to Leroy D. Clark (June 24, 1980), *reprinted in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917 (1980) 27, 28, 29

Note, *Jurisdictional Immunities of Intergovernmental Organizations*, 91 Yale L.J. 1167 (1982) 7, 21

Restatement (Third) of The Foreign Relations Law of the U.S., pt. IV, ch. 6, subchap. B intro note (1987) 6

Restatement of the Foreign Relations Law of the U.S. (Revised) § 464(1) (Tentative Draft No. 4) (1983) 6

The World Bank, *United States: Overview* (https://tinyurl.com/y962nwfk) 8

U.S. Dep't of the Treasury, *Resource Center: Multilateral Development Banks* (https://tinyurl.com/y7or656w) 3, 8

U.S. Dep't of the Treasury, *Press Center: Report on Multilaterol Development Bank Projects that Support Extractive Industries* (May 15, 2006) (https://tinyurl.com/y7cdc2fe) 9

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. Dep't of the Treasury, *Treasury Position on IFC Investment in Coastal Gujarat Power Limited* (Apr. 8, 2008) (https://tinyurl.com/ybqpf4j7) 12

U.S. Dep't of the Treasury, *Resource Center: Treasury Guidance for U.S. Positions on Multilateral Development Banks Engaging On Energy Projects and Policies* (https://tinyurl.com/y9fbcgvd) 10

United States Position: Proposed IFC Investment in Landmark Myanmar (Sept. 4, 2014) (https://tinyurl.com/yaxdwgy3) 10

United States Position: Proposed IFC Investment in Yoma Bank (July 1, 2014) (https://tinyurl.com/yb39xt2l) 10

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INTEREST OF AMICI CURIAE

Amici are former high-ranking attorneys in the Executive Branch of the United States Government.[1] Amicus Ambassador **C. Boyden Gray** worked in the White House for twelve years, first as counsel to the Vice President during the Reagan administration and then as White House Counsel to President George

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

H.W. Bush. He has also served as the United States Ambassador to the European Union and the United States Special Envoy to Europe for Eurasian Energy.

Amici **John B. Bellinger III**, **Davis Robinson**, Judge **Abraham D. Sofaer**, and **Edwin D. Williamson** each served as Legal Adviser at the United States Department of State. Mr. Bellinger also served as Senior Associate Counsel and Legal Adviser to the National Security Council. Judge Sofaer also served as the George P. Shultz Senior Fellow in Foreign Policy and National Security Affairs at the Hoover Institution, Stanford University, and as a United States District Judge in the Southern District of New York.

In their Executive Branch roles, amici were involved in advising with respect to the immunities of international organizations ("IOs") subject to the International Organizations Immunities Act, 22 U.S.C. § 288 *et seq.* (the "IOIA"), and with respect to issues of executive power in national security and foreign policy matters. Amici have filed this brief because they believe the current position of the United States, as reflected in its brief in this case, misinterprets the IOIA and fails to appreciate the national security and foreign policy concerns that underlie that statutory scheme. For more than 70 years, the United States has cooperated with other partner nations as a member of IOs, particularly the World Bank, the International Finance Corporation ("IFC"), and other members of the World Bank Group, in order to leverage its financial contributions to them to further its military, humanitarian, economic and

other interests throughout the world by ending extreme poverty and boosting shared prosperity.[2] Given the inherently diplomatic nature of these coalitions, Congress expressly directed that any decisions to restrict their immunity from suit in this Nation's courts be made by the President, in an exercise of the constitutional power to conduct foreign affairs.

Congress never altered that determination. Yet the United States now contends that when Congress enacted the Foreign Sovereign Immunities Act ("FSIA") three decades later, it decreed that the immunities of IOs would henceforth be governed by that statute, thereby restricting *sub silentio* the discretion Congress delegated to the President in 1945 to limit immunities of IOs in appropriate cases. That is wrong. The FSIA was enacted to address specific problems that had arisen in the context of foreign sovereign immunity and has no application or relevance to IOs. Unlike foreign sovereign immunity, which is based on comity and reciprocity, the immunities of IOs to which the United States is a party have always been predicated on functional and

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[2] This brief uses the phrase "MDB" to refer to the following multi-lateral development banks of which the United States is a member: the International Bank for Reconstruction and Development (generally known as the World Bank), IFC, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, and the European Bank for Reconstruction and Development. *See* U.S. Dep't of the Treasury, *Resource Center: Multilateral Development Banks* (https://tinyurl.com/y7or656w). IFC supports the World Bank's twin goals of "end[ing] extreme poverty and promot[ing] shared prosperity in every country," and is "the largest global development institution focused exclusively on the private sector in developing countries." *See* Int'l Fin. Corp., *Overview* (https://tinyurl.com/ybwfn6g4). It is, in effect, the World Bank's private-sector arm.

policy concerns particular to specific organizations, with the view of not permitting individual member-state interference with their functions and operations.

Contrary to the views of the current Administration, amici believe that application of the FSIA to IOs is inconsistent with both the IOIA's and the FSIA's plain texts and the national security and foreign policy concerns that underlie the IOIA. Whereas the purpose and effect of the FSIA was to place outside the Executive Branch's domain immunity decisions regarding foreign states, the IOIA expressly vested in the President—and, unless Congress says otherwise, the President alone—the power to make such decisions with respect to multilateral organizations of which the United States is a member. Congress has not altered that delegation, in the FSIA or elsewhere.

Amici believe adoption of petitioners' view would undermine United States foreign policy by compromising the Nation's role as a member, rather than a watchdog, of the IOs in which it participates. In this case, for example, petitioners seek to impose radical lenders' liability and detailed operating requirements on IFC, largely as a result of its policy of holding borrowers accountable to stringent environmental standards. IFC formulated that policy—and those standards—with the input of the United States and other IFC members, pursuant to a detailed, agreed-upon governance rubric that was the product of multilateral negotiation. If, suddenly, the imposition of such standards on borrowers leads to a risk of liability in, and the imposition of operating criteria by, U.S. courts, IFC may be restrained from undertaking activities that its members expect it to take in the fulfillment of its agreed-upon functions and purposes.

Any legitimate concerns about existing immunities of IFC or other IOs should be addressed by the President, on an entity-by-entity basis, as the IOIA contemplates, following diplomatic consultation with the foreign nations that are our partners in carrying out the important missions IOs pursue. That is what Congress intended. If the United States truly believes that restricting IO immunity is warranted notwithstanding the damage it would likely cause to our Nation's standing with its allies, then it should manifest that judgment by Executive Order after consultation with its partners, rather than by asking this Court to impose the result with a one-size-fits-all judicial decree.

ARGUMENT

I. UNLIKE SOVEREIGN IMMUNITY, IO IMMUNITY EXISTS TO ADVANCE THE UNITED STATES' FOREIGN POLICY INTERESTS.

Historians trace to a 1795 essay by Immanuel Kant the idea that each nation's interest in peace and prosperity could be furthered by participation in international organizations. *See* Gunnar Skirbekk & Nils Gilje, *A History of Western Thought: From Ancient Greece to the Twentieth Century* 287-88 (7th ed. 2001) (discussing Kant, *Perpetual Peace: A Philosophical Sketch* (1795)). Although regional organizations of states arose shortly after Kant wrote, his vision began to come to fruition on a worldwide scale in 1919, with the founding of the League of Nations. In the wake of World War II, after the failures of that institution had manifested themselves, the nations of the world—including, this time, the United States—came together to create a

broad array of IOs intended to advance their member nations' common interests.

Unlike foreign sovereign immunity, which rests on comity and reciprocity,[3] IO immunity exists to further each member's ***own*** direct interest in the effective functioning of the IOs in which it participates. *See, e.g.*, *Mendaro* v. *World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983) ("The strong foundation in international law for the privileges and immunities accorded to international organizations denotes the fundamental importance of these immunities to the growing efforts to achieve coordinated international action through multinational organizations with specific missions."). For that reason, as early as 1983, the D.C. Circuit recognized as a "well established" principle of international law that IOs are "entitled to such privileges and such immunity * * * as are necessary for the fulfillment of the[ir] purposes." *Id.* (quoting Restatement of the Foreign Relations Law of the U.S. (Revised) § 464(1) (Tentative Draft No. 4) (1983)).

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[3] *See, e.g.*, *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1322 (May 1, 2017) ("FSIA's objective is to give 'protection from the inconvenience of suit as a gesture of comity[.]'") (quoting *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003)); *Garb* v. *Republic of Poland*, 440 F.3d 579, 585 (2d Cir. 2006) (observing that the United States grants other nations immunity in its courts because it wishes to receive the same treatment abroad). Restatement (Third) of The Foreign Relations Law of the U.S., pt. IV, ch. 6, subchap. B intro note (1987) ("The privileges and immunities of international organizations are 'functional,' and, though modeled after those of states, differ from them in some measure, both in conception and content. * * * State and diplomatic immunities apply equally and reciprocally between one state and another; the immunities of an international organization are claimed, without reciprocity, by an organization vis-a-vis a state, generally a member state.").

International law makes clear that because this immunity is merely a tool to further the interests of member states, it need be conferred only by member states themselves. *Id.* at 615.

The IOIA reflects that instrumentalist view. With limited exceptions, all of which long postdate the enactment of the statutory language at issue here,[4] the Act provides immunity only to "organization[s] in which the United States participates pursuant to [a] treaty or under the authority of an[] Act of Congress." 22 U.S.C. § 288; *see also Mendaro*, 717 F.2d at 613. The Act also states that its immunities will exist regardless whether immunity granted to foreign governments is based on reciprocity. *See* 22 U.S.C. § 288f.[5] And the legislative history makes clear that a primary impetus for the IOIA's enactment was the specific, self-interested aim of empowering the United States by encouraging the fledgling United Nations to locate its headquarters here.[6]

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[4] *See* 22 U.S.C. § 288f-l.

[5] *See* Note, *Jurisdictional Immunities of Intergovernmental Organizations*, 91 Yale L.J. 1167, 1170-71 (1982) ("Because the IOIA immunities were * * * tailored to specific organizations and situations, they are different from the immunities of foreign governments, which are laid down by general international or national law, and are grounded on considerations such as reciprocity that do not apply to IGOs.") (citations omitted).

[6] *See* 91 Cong. Rec. 10,866 (1945) (statement of Rep. Cooper) ("[I]f we are to hope to have the United Nations Organization's headquarters to be located in the United States, it will be absolutely essential for [some form of immunity granting] legislation to be passed."); H.R. Rep. No. 79-1203, at 2 (1945) ("[T]he probability that the United Nations Organization may establish its headquarters in this country, and the practical certainty in any case that it would carry on certain activities in

When the United States acts as an IO member, it is engaged in core foreign policy conduct. The Nation's engagement with MDBs provides a prime example. The MDBs were conceived, with the United States often at their center, to help "rebuild European countries devastated by World War II." The World Bank, *History* (https://tinyurl.com/y9a3bne5). They have since branched out to provide support and funding for the development of other regions around the world. *See generally* U.S. Dep't of the Treasury, *Resource Center: Multilateral Development Banks* (https://tinyurl.com/y7or656w) ("Together, the MDBs provide support to the world's poorest in every corner of the globe, strengthening institutions, rebuilding states, addressing the effects of climate change, and fostering economic growth and entrepreneurship."). The relative power and importance of member states within each organization is carefully negotiated, and the United States plays a particularly prominent role. *See, e.g.*, The World Bank, *United States: Overview* (https://tinyurl.com/y962nwfk) ("As the only World Bank shareholder that retains veto power over changes in the Bank's structure, the United States plays a unique role in influencing and shaping development priorities."). The Nation takes on that mantle in order to "ensure[] that the United States can help shape the global development agenda, leveraging its investments to ensure effectiveness and on-the-ground impact." U.S. Dep't of the Treasury, *Resource Center: Multilateral Development Banks* (https://tinyurl.com/y7or656w).

Much of the United States' influence over MDBs is wielded through Treasury Department

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this country, makes it essential to adopt this type of legislation promptly.").

representatives. In their roles, such officials face difficult decisions not only about whether to support certain loans, projects, and policies, but also about how forcefully to exert the United States' leverage given its competing priorities and desire for smooth diplomatic relationships both within and outside the IO. Thus, hundreds or thousands of times a year, Executive Branch officials make judgments about whether to support or oppose particular projects or loans (and how quietly or emphatically to do so); what conditions should or should not be placed on participation in those projects; and—most relevant here—how grave the sanctions for failure to satisfy those conditions should be.[7]

Thus, in the IO context, unlike the foreign sovereign context, the United States has a seat at the table at which policy decisions are made. And the United States often uses that seat to advance its specific foreign policy aims. For instance, U.S. representatives at each MDB are required to "exercise" the United States' "voice and vote" in a "manner

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[7] *See, e.g.*, U.S. Dep't of the Treasury, *Press Center: Report on Multilateral Development Bank Projects that Support Extractive Industries* (May 15, 2006) (https://tinyurl.com/y7cdc2fe) (United States "support[ed]" $7M Asian Development Bank loan "to facilitate development of * * * forestry plantations" in Laos while "expressing considerable reservations about the project not addressing illegal and unsustainable logging"); *id.* (United States voted "no" on "extending a $25 million loan" to "a mid-size Russian oil company" pursuant to general policy of "oppos[ing] any IFC investments in the Russian oil and gas sector"); *id.* (United States supported $5M investment in Guinean mining industry, but "circulated a statement underlining the need for improvements in governance and transparency prior to mine construction and operation" and advocating that IFC "look closely at political development and government support for needed reforms").

consistent with" promoting "universal access to affordable, reliable, sustainable and clean energy"; helping "countries access and use fossil fuels more cleanly and efficiently"; helping "deploy renewable and other clean energy sources"; and supporting "development of robust, efficient, competitive, and integrated global markets for energy." U.S. Dep't of the Treasury, *Resource Center: Treasury Guidance for U.S. Positions on Multilateral Development Banks Engaging On Energy Projects and Policies* (https://tinyurl.com/y9fbcgvd). Similar requirements exist in other policy areas—and even where no written policy exists, a review of the United States' positions reveals the sensitive policy tradeoffs inherent in every decision it makes as an IO member.[8] By providing immunity, member nations ensure that such policy decisions, rather than member nations' domestic laws, maintain primacy in determining each IO's conduct.

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[8] *See generally United States Position: Proposed IFC Investment in Landmark Myanmar* (Sept. 4, 2014) (https://tinyurl.com/yaxdwgy3) (United States supported IFC investment in Myanmar hotel project, but emphasized importance of ensuring that "IFC investments in hotel-related projects * * * meet robust standards of additionality and development impact linked to the World Bank Group's poverty and shared prosperity goals"); *United States Position: Proposed IFC Investment in Yoma Bank* (July 1, 2014) (https://tinyurl.com/yb39xt2l) (United States supported project and expressed "appreciat[ion]" for IFC's decision to "preclude [a] client from using IFC resources to support activities involving, for example, involuntary resettlement, degradation of critical habitat, unsustainable forestry, or adverse impact on cultural heritage").

II. PETITIONERS' VIEW INVITES UNDUE INTERFERENCE IN SENSITIVE MATTERS OF FOREIGN POLICY.

As respondent ably demonstrates, there is no evidence that Congress, in 1945 or 1976, actually intended to alter the manner in which new exceptions to immunity under the IOIA would be recognized. In light of that void, petitioners' argument rests largely on the notion that the reasons Congress had for altering foreign sovereign immunity must have applied equally to IOs. Indeed, petitioners argue that it would have been "anomalous" for Congress to legislate with respect to foreign sovereigns while leaving to the Executive Branch the creation of new exceptions to IO immunity. *Cf.* Pet. Br. 32-33.

In fact, Congress had both historical and practical reasons for altering only the immunity of foreign sovereigns, while leaving that of IOs in place. Most critically, IOs—unlike foreign sovereigns—are instruments of their member states' foreign policies. Given that the Executive Branch generally conducts its foreign policy without the oversight of domestic courts, there is nothing peculiar about a regime in which the United States exerts influence over IOs through the voice and vote of the Executive Branch, rather than through the coercive influence of the judicial process. *Cf. Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976) (decisions on matters that "may implicate our relations with foreign powers" are "frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary"). Devolving IO immunity decisions to the Judiciary, as petitioners and the United States now ask this Court to do, would threaten to interfere with the Executive's foreign

policy prerogatives and the diplomatic relationships upon which IOs depend.

This case illustrates the point. In early 2008, the United States supported IFC's investment in the Coastal Gujarat Power Limited project. The United States pointed to its view that the project would "add 3 percent to total [power] generation capacity" in the regions it served, "benefit an estimated 16 million customers," "generat[e] an estimated 5,000 jobs during construction and another 700 during operation," and provide "cost competitive electricity to industry and agriculture, supporting potential increases in output and further contributing to growth and job creation." U.S. Dep't of the Treasury, *Treasury Position on IFC Investment in Coastal Gujarat Power Limited* (Apr. 8, 2008) (https://tinyurl.com/ybqpf4j7). However, the United States also exhibited some trepidation, warning IFC that the project had certain shortcomings and counseling it to "make greater effort" with respect to environmental requirements if it hoped to retain support for future, similar projects. *Id.*

Judicial oversight of IFC's conduct on that project would speak with a far different—and far louder—voice. Indeed, because petitioners seek specific, equitable relief in addition to damages, the judgment they seek is a plea for the courts to regulate IFC, by dictating to it what specific environmental policies and practices it must adopt. *See, e.g.*, Compl. at 79-80, *Jam* v. *IFC*, No. 15-612 (D.D.C.) (seeking "[i]njunctive relief" ordering IFC to, among other things, "[e]nsure that the coal conveyer belt is fully enclosed with piping technology for all 14 km to prevent fugitive coal dust"; "[e]nsure that stack emissions do not exceed allowable capacity and

particulate emission limits, per applicable laws and regulations"; and "[h]ave the Plant retrofitted with a closed cycle cooling system, or other system, that will be less damaging to the environment").

Such judicial prescriptions are at odds with the role the United States plays as but one member state. To begin with, as noted above, the Executive Branch takes great care in exerting influence over IO policies when they are formulated, through its "voice and vote." *See supra* at 8-10. In so doing, the Executive weighs competing tenets of the nation's foreign policy—including, as relevant here, concerns about environmental impacts—to determine whether a given project, policy, or IO action serves the United States' interests. *Cf. Munaf* v. *Geren*, 553 U.S. 674, 702 (2008) (courts should "not assume the political branches are oblivious to" humanitarian concerns when formulating foreign policy) (internal quotation marks omitted). Permitting federal courts to second-guess those determinations after the fact would violate the tenet that the Nation must speak with "one voice" on matters of foreign policy. *See id.* ("The Judiciary is not suited to second-guess" judgments of the "political branches" with respect to "sensitive foreign policy issues"). Moreover, entertaining petitioners' desire to subject IFC to litigation over its attempt to implement socially and environmentally beneficial loan conditions will necessarily reduce IFC's ability to undertake otherwise-desirable projects in the future.

Inviting litigation against IOs in U.S. courts also risks compromising this Nation's influence within the IOs in which it participates. The United States has long "accepted without qualification the principles that international organizations must be free to

perform their functions and that no member state may take action to hinder the organization." *Broadbent* v. *Org. of Am. States*, 628 F.2d 27, 34 (D.C. Cir. 1980); *Mendaro*, 717 F.2d at 615 (observing the "need to protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory").[9] If the United States may influence IO policy through use of its courts, other members are likely to assume that they may do the same.

Judicial interference as requested by petitioners would also frustrate our allies' expectations. As they well know, the United States is uniquely able to exert influence, as it hosts (and is the largest shareholder in) many of the world's most influential IOs. But if a court in Washington, D.C., can enjoin the 184-member IFC to require a power plant in Gujarat, India to "retrofit[]" a "closed cycle cooling system," see *supra* at 13, allies would naturally question our commitment to the principle that "United States law * * * does not rule the world." *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 454 (2007). To impose a judicial veto over IO policies would double-count the United States' membership, undermine bargained-for balances of power, and risk turning the American courts into a *de facto* international regulator. Absent clear authorization from Congress, this Court should resist petitioners' invitation to take on that role. *See*

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[9] IFC's Articles of Agreement provide regulatory immunity by providing that "[t]o the extent necessary to carry out the operations [of IFC as] provided for in" the Articles, IFC's assets and property "shall be free from all restrictions, regulations, controls and moratoria of any nature." Articles of Agreement of the Int'l Fin. Corp., art. VI, § 6, *entered into force* July 20, 1956, 7 U.S.C. 2197, T.I.A.S. No. 3620.

Morrison v. *Nat'l Australia Bank, Ltd.*, 561 U.S. 247, 255 (2010) (courts must presume "that Congress ordinarily legislates with respect to domestic, not foreign matters").

Rather than seeking to regulate IOs through its judiciary, the United States has always striven to influence these organizations through the Executive's participation. Because IOs are multilateral coalitions of sovereign states, all decisions of the United States involving them are necessarily diplomatic in nature. That includes the extraordinarily sensitive decision regarding immunity from suit, which Congress expressly vested with the President alone.

III. THE FSIA REFLECTS NO INTENTION TO ALTER EITHER THE EXECUTIVE'S ROLE UNDER THE IOIA OR THE IMMUNITIES THE ACT SETS FORTH.

It is undisputed that when the 1945 Congress provided that international organizations would receive the "same immunity from suit and every form of judicial process as is enjoyed by foreign governments," 22 U.S.C. § 288a, it necessarily intended and understood that it was granting IOs the same "virtually absolute" immunity, *Samantar* v. *Yousuf*, 560 U.S. 305, 311 (2010) (quoting *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)), that foreign governments had received since this Nation's founding.

The question for the Court, then, is how Congress intended for limitations on the high standard of immunity to be recognized, if that standard was not appropriate for a particular IO. The IOIA answers that question explicitly. Given the critical role that IOs play in the foreign policy of the United States, the

IOIA expressly delegates to ***the President*** the power to determine whether to limit the absolute immunity of any IO. *See* 22 U.S.C. § 288. That decision makes obvious sense. The conduct of foreign affairs is, after all, the "unique responsibility" of the President. *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413-15 (2003). And by granting as a statutory baseline the "virtually absolute" immunity that had been applied to foreign sovereigns for over 130 years, Congress ensured that ***the President*** would have primary control over the manner in which U.S. courts exercise control over IOs' operations.

By contrast, petitioners and their amici argue that when it enacted the FSIA, Congress implicitly revoked a large swath of that Executive discretion, providing that exceptions to IO immunity would be governed instead by broad statutory provisions that do not refer to IOs and were never intended to apply to the unique circumstances of specific IOs. But there is no evidence that Congress intended to do so. Although the FSIA was enacted for the precise purpose of withdrawing the Executive Branch from determinations of immunity with respect to foreign sovereigns, nothing in that statute even makes reference to, much less repeals, the provisions of the IOIA that ***expressly delegate*** that very authority in the IO context. Nor can petitioners point to any evidence that the Congress that passed the FSIA intended to alter the substantive rules that governed IO immunity.

A. The IOIA Vests In The President—Not The Courts—The Power To Limit The Immunity Of IOs.

In this case, petitioners repeatedly attack a straw man, contending that when Congress enacted the

IOIA in 1945, it was not "freezing" an absolute immunity rule "in place for all time." Pet. Br. 19.[10] But that is not amici's argument, nor is it what the IOIA provides. The question in this case is not ***whether*** Congress intended that limitations on IO immunity could be imposed in the future, but ***when*** and ***how*** it intended for that to be accomplished. And the statute provides a clear answer: Congress delegated to ***the President*** the power to limit the "virtually absolute" immunity of IOs in specific cases, taking into account the functions performed by the particular IO. *See Atkinson* v. *Inter-American Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998) (holding that Congress "delegate[d] to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances").

To begin with, the Act delegates to the President the sole power to designate by Executive Order an entity that meets certain requirements "as being entitled to enjoy the privileges, exemptions, and immunities provided in [the IOIA]." 22 U.S.C. § 288. Once the President issues such an order, the entity becomes an "international organization," and, unless the President says otherwise, is entitled to enjoy the immunity the IOIA provides. *Id.*

Petitioners and their amici fail to acknowledge the importance of the President's ability to tailor IO immunity. In plain terms, the Act authorizes the

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[10] *See also id.* at 21 (arguing that Congress did not intend "to freeze in the particulars of [immunity] law that existed in 1945"); *id.* at 25 (statute was not drafted "to freeze the law as of 1945"); *id.* at 27 (Congress did not intend to grant IOs "static absolute immunity from suit"); *accord* Pet. App. 15a (IO immunity is "not frozen as of 1945") (Pillard, J., concurring).

President to "withhold or withdraw" recognition of a particular international organization entirely. 22 U.S.C. § 288. And, in sweeping language suggestive of a nearly unqualified delegation, the IOIA also authorizes the President,

> in the light of the functions performed by any * * * international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in [the IOIA] or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity.

Id. The legislative history reinforces that these are "broad powers granted to the President," which "will permit prompt action in connection with any abuse of the privileges and immunities granted [under the IOIA] or presumably for other reasons such as the conduct of improper activities by international organizations in the United States." H.R. Rep. No. 79-1203, at 3 (1945). Consistent with the statute's text and legislative history, Presidents have invoked section 288 throughout the IOIA's history to limit and to restore IO immunity.[11]

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[11] *See, e.g.*, Exec. Order No. 12,425, 48 Fed. Reg. 28069 (June 16, 1983) (granting the International Criminal Police Organization ("INTERPOL") only limited immunities under the IOIA); Exec. Order No. 13,524, 74 Fed. Reg. 67803 (Dec. 16, 2009) (extending full immunity to INTERPOL in light of its establishment of a United States office); Exec. Order No. 12,359, 47 Fed. Reg. 17,791 (Apr. 22, 1982) (granting International Food Policy Research Institute only limited immunities); Exec. Order No. 11,718, 38 Fed. Reg. 12,797 (May 16, 1973) (granting the INTELSAT only limited immunities).

The President's ability to deviate downward from absolute immunity is critical to the IOIA's structure. Recent experience had shown that the case-by-case procedure the State Department and courts had employed for determining foreign sovereign immunity was inherently unpredictable, *see* G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1, 134-45 (1999), and individual congressmen were concerned about abuses of immunity by rogue IOs and their officers. By adopting the substantive law of absolute immunity but incorporating a new, structured procedure for the President to alter it by Executive Order, the IOIA guarded against abuses while also assuring IOs they would receive adequate protection from judicial oversight of their U.S.-based operations.

B. The FSIA Does Not Silently Reduce IO Immunity Or Revoke The President's Power To Tailor That Immunity.

There is no indication that when Congress passed the FSIA, it intended to alter—much less dramatically reduce—the President's role in defining IO immunities. Congress did not incorporate IOs into the FSIA's detailed definition of "foreign states," which includes agencies and instrumentalities of such states. *See* 28 U.S.C. § 1603(a), (b). Indeed, as the United States has previously acknowledged, the FSIA mentions IOs only once, and solely for the purpose of ***safeguarding*** their immunities. *See* Br. for the United States as Amicus Curiae at 17 & n.*, *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463 (2d Cir. 2006) (No. 06-403) ("*EM* Br.") ("Congress did not want the FSIA to conflict with the immunity accorded to [international] organizations under pre-existing law."). The FSIA's legislative history confirms that

intention. H.R. Rep. No. 94-1487, at 31 (1976) (FSIA's sole "reference to 'international organizations' * * * [was] ***not intended to restrict any immunity accorded to such international organizations*** under any other law or international agreement") (emphasis added).

The absence of any indication that Congress intended to limit IO immunity speaks volumes. The IOIA's delegation to the President of the sole discretion to withdraw, modify, or condition the immunity of international organizations composed of foreign states unquestionably involves the President's foreign affairs powers. And unless Congress "clearly manifest[s]" its "intent," this Court does not presume that it has restricted the President's "unique" role in that area. *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993). Because Congress has never indicated any intention to withdraw or limit the powers it delegated to the President in the IOIA, this Court should reject petitioners' view.

Moreover, the IOIA and the FSIA are at cross purposes. In Section 288, the IOIA provides the President the maximum possible discretion in deviating downwards from a default of near-complete immunity.[12] The FSIA's effect, by contrast, is to take

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[12] Amici Bipartisan Members of Congress argue that the discretion afforded the President "potentially raises serious constitutional concerns," insofar as the power to adjust IO immunities carries with it the ability to alter the jurisdiction of federal courts. *See* Members Br. 13-16. But this Court has already deemed an analogous delegation "entirely unremarkable," since "the granting or denial of * * * immunity" to foreign entities "was historically the case-by-case prerogative of the Executive Branch." *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 857 (2009). Regardless, if the delegation did pose such a problem, petitioners' interpretation would not avoid it. *See, e.g.*, Pet. Br.

those same determinations out of the Executive's hands in the context of foreign sovereign immunity. *See* Note, 91 Yale L.J. at 1176-77 ("[T]he FSIA's stated goal of depoliticizing immunities is incompatible with the broad powers given the Executive in the IOIA."). Thus, if petitioners are correct, the FSIA does not merely ***update*** the IOIA; it ***impliedly repeals*** much of section 288's delegation of discretion to the President. Yet the FSIA gives no indication that Congress intended such a repeal. *Cf. Branch* v. *Smith*, 538 U.S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in irreconcilable conflict, or where the latter Act covers the whole subject of the earlier one and is clearly intended as a substitute.").

Indeed, Congress's reasons for enacting the FSIA did not apply to IOs. Those reasons arose from inefficiencies associated with the "two-step" process for foreign sovereign immunity under which foreign states sued in U.S. courts applied to the State Department for a suggestion of immunity that the courts would then recognize. *See Samantar*, 560 U.S. at 311-12. After the 1952 Tate Letter, the State Department applied the "restrictive" theory only inconsistently, and often deviated from it on the basis of "political considerations." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 690 (2004). Moreover, "foreign nations did not always make requests to the State Department," so the responsibility often "fell to the courts to determine whether sovereign immunity

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5 (acknowledging President's authority "to limit any of the IOIA's privileges, exemptions, and immunities"); *see also* Members Br. 3 (When IOIA was enacted, "courts generally deferred to the political branches about the scope of immunity, and foreign sovereigns often enjoyed absolute immunity from suit.").

existed," generally by reference to those same, inconsistent State Department decisions. *Verlinden*, 461 U.S. at 487-88. The result was that "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations," and, "[n]ot surprisingly, the governing standards were neither clear nor uniformly applied." *Id.* at 488.

Congress passed the FSIA for the specific purpose of eliminating that problem.[13] But the problem had no relevance to the IOs. The IOIA bestows upon the President the sole authority to modify, withdraw or otherwise condition the immunities of IOs ***by Executive Order***, rather than by suggestion of immunity. Therefore, the difficulties in discerning Executive Branch policy caused by the two-step process did not apply to the IO context, where courts well understood that once an IO was designated, immunity attached without any further input from the political branches. *See Lutcher S.A. Celulose e Papel* v. *Inter-American Dev. Bank*, 382 F.2d 454, 456 (D.C. Cir. 1967) (Burger, J.) ("In 1960 President Eisenhower designated the Bank as an international organization entitled to immunity, hence the question of the Bank's immunity turns on whether it has waived immunity from suit."); *Soucheray* v. *Corps of Eng'rs of U.S. Army*, 483 F. Supp. 352, 355 (W.D. Wis.

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[13] *See* H.R. Rep. No. 94-1487, at 8 (1976) (statute's purpose was "to transfer the determination of sovereign immunity from the executive branch to the judicial branch"); *see also* Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal For Reform of United States Law*, 44 N.Y.U. L. Rev. 901, 903 (1969) (codification would make it "possible to eliminate completely the participation of the Executive Branch * * * from the process of adjudication of claims against foreign states").

1979) (holding, without reference to FSIA or a two-step process, that "the [International Joint] Commission and its employees or representatives are immune from suit under" IOIA).

It is not surprising, then, that petitioners cite no evidence that IOs routinely sought State Department suggestions of immunity before enactment of the FSIA. The parties and amici in this case have identified only a single instance from between 1945 and 1976 in which an IO sought or obtained a suggestion of immunity. *See* Resp. Br. 33 n.13. And the letter that the United States relies on to allege that the two-step process continued to govern IOs, *see* U.S. Br. 30, reveals precisely the opposite. *See* Letter from Detlev F. Vagts, Office of the Legal Adviser, to Robert M. Carswell, Jr., OAS 1 (Mar. 24, 1977) ("Vagts Ltr.") (clarifying that in the sixteen years immediately preceding the FSIA's passage, the State Department did not author a single suggestion of immunity in an IO case).[14]

Because there is no evidence that either the 1945 Congress or the 1976 Congress intended to effect the sweeping revision of the IOIA that Petitioners seek, this Court should decline to hold that the FSIA governs the immunity of IOs.

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[14] The United States stretches to interpret the letter as "indicating" that before 1960, the State Department was in the habit of authoring such suggestions. *See* U.S. Br. 30. But a more likely reading is that the letter's author determined that an unsuccessful search through seventeen years' worth of files sufficed. Vagts Ltr. at 1 ("A search of our files and the published cases indicates that since 1960 we have not been filing suggestions of immunity in international organization cases.").

IV. NEITHER PETITIONERS NOR THEIR AMICI OFFER A JUSTIFICATION FOR REJECTING THE D.C. CIRCUIT'S LONGSTANDING RULE.

Given that application of the FSIA to IO immunity would transform the separation of powers in a critical area of the foreign policy of the United States, this Court should resist petitioners' invitation to wade into these sensitive diplomatic matters without invitation. *See, e.g.*, *Kiobel* v. *Royal Dutch Petrol. Co.*, 569 U.S. 108, 116 (2013) (guarding against "unwarranted judicial interference in the conduct of foreign policy" by requiring "clear indication" from Congress before passing on matters of foreign affairs). Petitioners and their amici offer a number of arguments to the contrary, but none is persuasive.

A. "Deference" To The Executive Branch Is Unnecessary Where, As Here, The Court Of Appeals' Rule Affords The President Discretion To Enact His Preferred View.

The United States repeatedly urges this Court to "defer[]" to the United States' interpretation "of the privileges and immunities afforded by the IOIA in order to fulfill the United States' international obligations." U.S. Br. 29; *see also id.* at 12, 24. To be sure, due regard for the Executive Branch's views in sensitive matters of foreign policy is ordinarily appropriate. But deference to the current administration's views is neither necessary nor appropriate here, because the court of appeals' longstanding rule will in no way hinder the United States' ability to fulfill its international obligations.

In fact, Congress has already provided the Executive Branch near-absolute discretion on this issue.

Pursuant to the IOIA's delegation, the President has virtually limitless authority to deviate downward from the broad immunity the IOIA sets forth. *See* 22 U.S.C. § 288 (authorizing the President to "withhold," "withdraw," "condition," or "limit the enjoyment of" any IOIA immunity by "any" IO "in the light of the functions" it performs). That authority is not merely hypothetical. As noted above, Presidents have, when necessary, altered the immunities available to particular organizations under the IOIA. *See supra* note 11. Indeed, in certain instances, Presidents have limited IO immunity in a manner that overlaps substantially with the "commercial activities" exception that petitioners hope to impose here. *See, e.g.*, Exec. Order No. 13,042, 62 Fed. Reg. 18,017 (Apr. 9, 1997) (designating World Trade Organization an IO, but withholding immunity from taxation for WTO property that is leased or rented for profit). And, to the extent the statute expresses a preference for individualized consideration of IO immunities (as petitioners and the United States argue, and as Judge Pillard suggested below), that is all the more reason to reject the conclusion that Congress later restricted the immunities of all IOs in a single stroke.[15] If

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[15] Petitioners argue that while the President may alter the immunities of individual IOs, he lacks the authority to reduce immunity for IOs as a class. Pet. Br. 30; *see also* Pet. App. 13a-14a (Pillard, J., concurring). The United States, however, does not endorse that argument. *See* U.S. Br. 22-23. And with good reason: The Act, which delegates to the President the authority to reduce the immunity of "***any***" IO, 22 U.S.C. § 288 (emphasis added), cannot possibly be interpreted to prohibit him from changing the rules as to all of them. *See, e.g., Beaty*, 556 U.S. at 856 ("Of course the word 'any' * * * has an expansive meaning."). If some previously unknown foreign-policy exigency or other event would lead the President to favor according restrictive immunity to IOs in the future, he could simply do so by Executive

legitimate concerns existed regarding the scope of immunity for IFC or other IOs, any limitations should be crafted, as Congress intended, through tailored Presidential action after diplomatic consultation and discussions, rather than through the one-size-fits-all application of a tangled statute that was never intended for the purpose.

B. Neither Congress Nor The Executive Branch Has Consistently Endorsed Petitioners' View.

Even if deference were otherwise appropriate, petitioners and the United States fail to establish that either the Executive Branch or Congress has consistently endorsed petitioners' position. *See, e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) (rejecting Executive Branch interpretation of statute where it had been inconsistent over time).

1. *The Executive Branch.* The United States has scarcely spoken to the issue of IO immunity in the wake of the D.C. Circuit's decision in *Atkinson*, 156 F.3d 1335. When it has done so, it has taken precisely the opposite position from the one it advances here. *See EM* Br. 17 & n.* (arguing that the 1976 Congress did not "want the FSIA to conflict with the immunity accorded to [IOs] under pre-existing law," and citing *Atkinson* as "explaining that the [IOIA] provides for absolute immunity of covered organizations").

Indeed, amici are unaware of any instance in which the United States has advocated for restrictive IO immunity in a circumstance in which the distinction was material. To the contrary, in each of the cases

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Order, without enlisting this Court in the cause—provided, of course, he took account of "the functions performed by [the] * * * international organization[s] * * *." 22 U.S.C. § 288.

cited by petitioners and their amici in which the United States advocated that view, it nevertheless argued that the IO was immune from the claim there at issue.[16] Only in *EM*, where the United States took the same position with respect to the IOIA that respondents take here, were its views on IOIA immunity material to its conclusion. *See supra* at 19.

Even the Owen Letter, which is quoted and relied on by petitioners, their amici, and the concurrence below, did not rest its conclusion on Owen's observation about the IOIA's relationship to the FSIA. *See* Letter from Roberts B. Owen, State Department Legal Adviser, to Leroy D. Clark (June 24, 1980) ("Owen Ltr."), *reprinted in* Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917, 918 (1980) ("By virtue of the FSIA, and ***unless otherwise specified in their constitutive agreements***, international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities, ***while retaining immunity for their acts of a public character***.") (emphasis added). Rather, Owen's conclusion was that the

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[16] *See* Br. for the United States as Intervenor at *2-3, *11-12, *Veiga* v. *WMO*, 368 F. App'x 189 (2d Cir. May 1, 2009) (No. 08-3999-cv), 2009 WL 8186687 (advocating for immunity while expressing no position as to whether IOIA incorporates FSIA); Br. for the United States as Amicus Curiae at *5 n.3, *Taiwan* v. *U.S. Dist. Ct. for the N. Dist. of Cal.*, 128 F.3d 712 (9th Cir. 1997) (No. 97-70375), 1997 WL 33555046 (IO immunity not at issue in immediate proceeding); Br. for the United States as Amicus Curiae at *15, *Corrinet* v. *United Nations*, No. 96-17130 (9th Cir. Mar. 12, 1997), 1997 WL 33702375 (acknowledging that "FSIA does not" govern UN's immunities); Br. for the United States as Amicus Curiae at 11-18, *Broadbent* v. *Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465) (immunity should be afforded with respect to internal personal matters).

World Bank was immune from regulation and claims in respect of internal personnel matters.

Amici believe the Owen letter is more complex and thoughtful than as presented for two reasons. First, it contains two important qualifications to the flat statement that IOs' immunities are the same as sovereigns' immunities.[17] Those qualifications, which are critical to understanding the Owen letter, reflect important insights about the difference between IO and foreign sovereign immunity. And, second, the letter provides the context in which IOs are given immunities.

The letter's first qualification—providing that IOs receive restrictive immunity "unless otherwise specified in their constitutive agreements"—is more than a mere reference to other immunities that an IO might enjoy. Rather, it is an indication that, as the IOIA requires, the functions and purposes of an IO must be taken into consideration before subjecting an IO to the jurisdiction of our courts in respect of its commercial activities. Likewise, the second qualification—the reference to "acts of a public character"—is unlikely to be a reference strictly to acts *de jure imperii* (acts that only a sovereign may perform), excluding all acts *de juris gestionis* (commercial acts). Rather, it is a reference to acts performed to fulfill the functions that an IO would be expected, as indicated in its constitutive agreements, to perform on behalf of its sovereign members. In amici's considered view, the IOIA means, and Owen meant, that the immunity of an IO such as IFC, whose functions (as outlined in its Articles of Agreement)

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[17] The qualifications were replaced by ellipses when quoted by petitioners and Judge Pillard below, Pet Br. 9, Pet. App. 15a.

require it to engage in commercial activities with the private sector, cannot be limited across-the-board in respect of commercial activities without a review of the impact of such a limitation on the IO's ability to perform its functions. The issue is much more complicated and fraught with difficulties than a simplistic assertion that henceforth IFC shall not have immunity in respect of its commercial activities. The irony is that petitioners' position, which would permit American courts to impose liability on IFC for a supposed failure to enforce environmental conditions on development loans and falls well short of what Owen envisioned, eliminates the careful scrutiny of an IO's functions, as required by the IOIA and the Owen Letter, before an IO's immunities may be limited, replacing it with a wholesale, across-the-board limitation of all IOs' immunities, regardless of how that limitation will impact their functions.

Amici also believe Owen's admonition that "the privileges and immunities enjoyed by public international organizations impose a special responsibility on them and their Member States to ensure that internal procedures provide effective methods of addressing and resolving 'labor-management' disputes," Owen Ltr. at 920, is a reminder that the constitutive agreements of IOs create a ***single***, ***collective*** governance system through which their sovereign members control. It is through that system that appropriate rules and practices, such as financial controls, employment rules, and environmental standards and practices, are imposed and monitored by those sovereign members. Owen found that the members had determined that the World Bank recognized and met this "special responsibility." *Id.* Whether IFC has done the same

with respect to enforcement of the environmental requirements attached to its loans should be determined by its member states—not by a court of one of them.

2. *Congress.* Nor has Congress provided the requisite "clear indication" that it intended to restrict the President's power in all cases involving IOs. *See Kiobel*, 569 U.S. at 116. The United States suggests that by occasionally passing legislation providing absolute immunity to particular IOs, Congress has endorsed petitioners' view. *See* U.S. Br. 25-27. That is incorrect. As the United States itself observes, there is no anomaly in Congress's enshrining in a statute an immunity that previously existed as a matter of Executive grace. *See, e.g.*, U.S. Br. 6, 23-24 (discussing FSIA's codification of restrictive theory). Far from being "redundant," *cf. id.* at 27, such legislation has the tangible effect of withdrawing the President's authority to delist or otherwise restrict a particular IO's immunity.

The United States' extensive reliance on 19 U.S.C. § 3511(b), in which Congress authorized the President to "implement article VIII of the WTO Agreement," U.S. Br. 25-26, is not to the contrary, because respondent's view plainly does not render that delegation duplicative. The power to "implement article VIII" was not merely the power to grant absolute immunity from litigation (in which case the delegation might have been duplicative of the IOIA), but ***also*** the ability to confer on the WTO a wide range of rights, privileges, and immunities guaranteed by the twelve-page, forty-nine-section Convention on the Privileges and Immunities of the Specialized Agencies (the "Specialized Agencies Convention"). *See* Marrakesh Agreement Establishing the World Trade

Organization, art. VIII(4), *entered into force* Jan. 1, 1995, 1867 U.N.T.S. 154 (requiring members to provide the privileges and immunities provided by the Specialized Agencies Convention, *entered into force* Dec. 2, 1948, 33 U.N.T.S. 261).

C. The Supposed "Practical Problems" The United States Invokes Have Not Appeared In The 35 Years Since *Mendaro* Or The 20 Years Since *Atkinson*.

Finally, the United States offers two "practical difficulties" it associates with the court of appeals' rule. U.S. Br. 29-31. Neither one justifies application of the FSIA to IOs.

First, the United States argues that supposed "uncertainties" in the historic law of immunity counsel in favor of adopting petitioners' view. *Cf.* U.S. Br. 30-31. But this Court has never held that uncertainty about the outer reaches of a particular statutory rule justifies disregarding what Congress has enacted. *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 359 (1993) (Court cannot simply "throw up [its] hands" in lieu of applying complex statute). And in any event, determining the "contours" of an IO's immunity under the methodology of *Mendaro* and *Atkinson* has not proven difficult in practice. This case proves the point: The blind application of the "commercial activity" exception would present knotty issues as applied to a multilateral development bank that exists solely to advance public policies through commercial transactions with the private sector. By contrast, petitioners do not (and cannot) argue that the application of the *Mendaro* and *Atkinson* methodology is at all uncertain. Indeed, they point to no case, from either the 20 years since *Atkinson* or the 70 years since the IOIA was enacted, in which any

court has had any difficulty discerning the contours of any IO's immunity under the rule *Atkinson* endorsed.[18]

Even if one could hypothesize a case in which it might be difficult to determine the contours of absolute immunity, such a difficulty could plainly be addressed, as Congress intended, by the President under the IOIA's delegation of power. Moreover, the hypothetical nuisance to which the United States points pales in comparison to the difficulty of trying to graft onto IOs the FSIA's notoriously vague provisions. To take one example, the clumsy language of the FSIA's "commercial activity" exception, 28 U.S.C. § 1605(a)(2), has proved exceedingly difficult for courts to apply even to the foreign states it was ***intended*** to govern.[19] It promises to raise even greater uncertainty in the IO context, where numerous institutions were specifically designed to effectuate important public policy objectives through activities, such as borrowing and lending, that might otherwise seem commercial. Indeed, in a testament to the FSIA's poor drafting, this Court has often sought clarity in the same common-law history the United States now derides. *See Weltover*, 504 U.S. at 612-614 (disregarding as useless the FSIA's definition of "commercial," and resorting instead to State

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[18] The Third Circuit's opinion in *OSS Nokalva, Inc.* v. *European Space Agency*, 617 F.3d 756 (3d Cir. 2010), is no exception, because that court did not even purport to apply the *Atkinson* rule. *Id.* at 761-66.

[19] *See, e.g.*, *Nelson*, 507 U.S. at 358-59 (decrying FSIA's definition of "commercial activity" as "distinguished only by its diffidence," insofar as it "leaves the critical term 'commercial' largely undefined"); *Republic of Argentina* v. *Weltover*, 504 U.S. 607, 612 (1992) (same).

Department's pre-FSIA policy). In view of the challenges associated with interpreting the FSIA in its intended context, this Court should view with skepticism the United States' invitation to expand the statute's reach more broadly.

Second, the United States argues that under the court of appeals' view, it is unclear whether the IOIA simply incorporated the two-step approach that governed foreign sovereign immunity in 1945. U.S. Br. 12-13, 29-30 (faulting court of appeals for "assum[ing]" that "Section 288a(b) incorporates" only "***substantive***" standards," and "not the two-step procedure"); *see also* Pet. Br. 37-43 (arguing that FSIA represents the view of the political branches, which Court would be bound to respect under two-step approach). But to the extent the ad hoc, two-step procedure existed in 1945, the IOIA ***replaced*** it, by the operation of section 288's plain text, with a new regime for IOs under which immunities were established (and could be modified) in Executive Orders, rather than State Department suggestions. *See* 22 U.S.C. § 288; *supra* at 22-23. Thus, petitioners' alternative argument fails for the very same reason as its principal one: The IOIA codifies as the default standard "virtually absolute" immunity unless Congress or the President says otherwise, and neither has done so in any legally cognizable manner. If the Executive Branch is now saying otherwise, the President should change the immunities of IFC using the authority given to him under the IOIA, rather than by passing the chore to the Judiciary.

CONCLUSION

For the foregoing reasons, and those in respondent's brief, the judgment below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, ET AL.,
Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* FORMER SECRETARIES OF STATE AND SECRETARIES OF THE TREASURY IN SUPPORT OF RESPONDENT INTERNATIONAL FINANCE CORPORATION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
ARGUMENT	3
I. IFC FURTHERS IMPORTANT U.S. POLICY GOALS.	3
II. MDBs ARE FUNDAMENTALLY DIFFERENT FROM SOVEREIGNS.	5
III. IMMUNITY IS NECESSARY FOR IFC TO PERFORM ITS MISSION	7
IV. A RESTRICTIVE IMMUNITY REGIME WOULD OPEN IFC AND OTHER MDBs TO BURDENSOME LITIGATION THAT WOULD DIVERT RESOURCES FROM THEIR MISSION	9
V. THE JUDICIARY SHOULD NOT UPEND THE WELL-ESTABLISHED UNDERSTANDING THAT MDBs ENJOY ABSOLUTE IMMUNITY	11
A. The Need For IO Immunity Has Long Been Recognized	11
B. The IOIA Was Enacted Against The Backdrop Of This International Understanding	13
C. IFC Has Long Been Understood To Enjoy Immunity From Suit, And The Judiciary Should Not Change This Stable Legal Status	14
CONCLUSION	15

TABLE OF AUTHORITIES

CASES Page(s)

Atkinson v. Inter-American Dev. Bank, 156 F.3d 1335 (D.C. Cir. 1998) 13

Banco de Seguros del Estado v. Int'l Fin. Corp., Nos. 06 Civ. 2427(LAP), 06 Civ. 3739(LAP), 2007 WL 2746808 (S.D.N.Y. Sept. 20, 2007) 14

In re Dinastia, L.P., 381 B.R. 512 (S.D. Tex. 2007) 14

Jam v. Int'l Fin. Corp., 172 F. Supp. 3d 104 (D.D.C. 2016) 8

Mendaro v. World Bank, 717 F.2d 610 (1983) 7-8

Rendall-Speranza v. Nassim, 107 F.3d 913 (D.C. Cir. 1997) 10-11, 14

Zuza v. Office of the High Representative, 857 F.3d 935 (D.C. Cir. 2017) 10

TREATIES

Articles of Agreement of the International Finance Corporation, 7 U.S.T. 2197 (July 20, 1956) 6, 14

COURT FILINGS

Br. United States, *Veiga v. World Meteorological Organization*, 2009 WL 8186687, No. 08-3999-cv (2d Cir. Mar. 3, 2010) 5

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES — Page(s)

91 CONG. REC. 10866 (Nov. 20, 1945) 9-10

Charles H. Brower, II, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, 41 VA. J. INT'L L. 1 (Fall 2000) 6

Edwin H. Fedder, *The Functional Basis of Int'l Privileges & Immunities: A New Concept in International Law and Organization*, 9 AM. U. L. REV. 60 (1964) 13

IFC, *Management's Discussion and Analysis and Consolidated Financial Statements* (June 30, 2018) 4

International Finance Corporation: Hearings on S. 1894 before International Finance Subcomm. of S. Comm. On Banking and Currency, 84th Conf. (1955) 8

Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 AM. J. INT'L L. 828 (1947) 7

Letter from Robert B. Owen, State Dep't Legal Adviser, to Leroy D. Clark, Gen. Counsel, Equal Emp't Opportunity Comm'n (June 24, 1980), in Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 917 (1980) 13

Press Release, U.S. Dep't of the Treasury, Secretary Paulson Announces New Latin American and Caribbean Initiative (Jul. 6, 2007) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Press Release, U.S. Dep't of the Treasury, Statement by Secretary Timothy F. Geithner to the IMF and World Bank (Apr. 16, 2011) 4-5

Press Release, Statement of U.S. Dep't of the Treasury, Secretary Steven T. Mnuchin to the Development Committee of the World Bank and International Monetary Fund (Apr. 21, 2017) 4

S. REP. NO. 79-861 (1945) 12, 13

Statement by U.S. Treasury Secretary Jacob J. Lew to the Joint Ministerial Committee of the World Bank and the IMF (Oct. 11, 2014) 4

U.S. Dep't of State, Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, The Secretary of State, Pub. 2349, Conference Series 71 (June 26, 1945) 12

U.S. DEP'T TREASURY, REPORT TO CONGRESS FROM THE CHAIRMAN OF THE NATIONAL ADVISORY COUNCIL ON INTERNATIONAL MONETARY AND FINANCIAL POLICIES (June 2018) 3-4

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. DEP'T OF THE TREASURY, RESOURCE CENTER: MULTILATERAL DEVELOPMENT BANKS, https://www.treasury.gov/resource-center/international/development-banks/Pages/index.aspx (last visited Sept. 14, 2018). 10

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are a bipartisan group of former Secretaries of State and Secretaries of the Treasury with decades of service to the Nation. During their tenures, *amici* Secretaries of State were responsible for developing and managing U.S. foreign policy, including as to relationships with international financial institutions and economic programs in developing countries. *Amici* Secretaries of the Treasury formulated and managed U.S. economic policy and economic development programs, including with respect to multilateral development banks ("MDBs") such as the International Finance Corporation ("IFC").

James A. Baker, III served as Secretary of the Treasury from 1985 to 1988 in the Reagan Administration and as Secretary of State from 1989 to 1992 in the George H.W. Bush Administration. Timothy F. Geithner served as Secretary of the Treasury from 2009 to 2013 in the Obama Administration. John F. Kerry served as Secretary of State from 2013 to 2017 in the Obama Administration. Jacob J. Lew served as Secretary of the Treasury from 2013 to 2017 in the Obama Administration. Henry M. Paulson, Jr. served as Secretary of the Treasury from 2006 to 2009 in the George W. Bush Administration. Robert E. Rubin served as Secretary of the Treasury from 1995 to 1999 in the Clinton Administration. George P. Shultz served as Secretary of the Treasury from 1972 to 1974

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[1] Pursuant to Supreme Court Rule 37.3(a), *amici curiae* state that counsel for all parties consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no person or entity aside from counsel for *amici curiae* made any monetary contribution intended to fund the preparation or submission of this brief.

in the Nixon Administration and as Secretary of State from 1982 to 1989 in the Reagan Administration. Lawrence H. Summers served as Secretary of the Treasury from 1999 to 2001 in the Clinton Administration.

Amici have filed this brief because they believe that IFC, which was established to engage in development-focused lending to private enterprises, always has been and should continue to be immune from third-party suits in connection with its lending activities. That immunity is critical to the public policy mission of IFC; and it is in our national interest that IFC be able to fulfill its mission without concern for liability from private lawsuits in the United States.

ARGUMENT

I. IFC FURTHERS IMPORTANT U.S. POLICY GOALS.

MDBs serve a range of important U.S. policy goals, and immunities are important to achieve those goals. IFC itself is deeply rooted in American history. It had its genesis in the 1950s through the work of IFC founder Robert Garner, who had a vision of healing and developing the post-War world by advancing private enterprise, industry, and agriculture through multilateral public finance. The goal was simple: increase production of goods, spur new jobs for more people, raise the standard of living, and build a global economy in which the rising tide lifts all boats.

That support for IFC's founding goals, and the goals of MDBs generally, continues as a fundamental principle in American foreign policy today. As the Department of the Treasury recently reported to Congress:

> U.S. participation in the MDBs can: (1) foster U.S. national security by supporting MDB engagement with fragile and conflict-affected states (*e.g.*, Ukraine, Iraq, and Afghanistan) and providing assistance that addresses the root causes of instability; (2) promote U.S. economic growth through exports by helping the MDBs boost growth in emerging markets; (3) help respond to global crises, such as the refugee crisis in the Middle East and North Africa and natural disasters, and build countries' resilience to future crises; and (4) address global priorities, such as energy security, food security, and environmental degradation.

U.S. DEP'T TREASURY, REPORT TO CONGRESS FROM THE CHAIRMAN OF THE NATIONAL ADVISORY COUNCIL ON INTERNATIONAL MONETARY AND FINANCIAL POLICIES (June 2018), at 7.

IFC serves these policy goals through public investment in private sector development. It is in the United States' interest to support this "emphasis on the private sector as the engine of growth and . . . to unleash private investment in the world's poorest countries." Press Release, Statement of U.S. Dep't of the Treasury, Secretary Steven T. Mnuchin to the Development Committee of the World Bank and International Monetary Fund (Apr. 21, 2017). IFC's goal is not to compete in commercial markets; it is to "create markets in poor economies," and thus "to support job creation and create opportunities in the most difficult environments." *Id.*

The United States has invested a total of more than USD 569 million in IFC since its founding, and the Department of the Treasury has consistently emphasized the United States' interest in the mission and approach of IFC. *See, e.g.*, IFC, *Management's Discussion and Analysis and Consolidated Financial Statements* (June 30, 2018); Statement by U.S. Treasury Secretary Jacob J. Lew to the Joint Ministerial Committee of the World Bank and the IMF (Oct. 11, 2014) ("We see great potential for the International Finance Corporation (IFC) to deepen its engagement in fragile and conflict-affected states and call upon the IFC to redouble its efforts in these countries and seek out investments with the greatest levels of development impact, even if this requires taking more financial risk."); Press Release, U.S. Dep't of the Treasury, Statement by Secretary Timothy F. Geithner to the IMF and World Bank (Apr. 16, 2011) ("The IBRD and the

IFC, in particular, have a central role to play on behalf of the international community, both in bringing their substantial financial resources to bear and in providing the smart and targeted investments that can best support these new transitions."); Press Release, U.S. Dep't of the Treasury, Secretary Paulson Announces New Latin American and Caribbean Initiative (Jul. 6, 2007) ("The United States' interest in [IFC's mission in] the Americas is strong. We are committed to helping the region reduce poverty, fight corruption, build a middle class, and generate more opportunities, including for those who currently feel excluded from the region's growing prosperity . . . ." (internal quotation marks omitted)).

A healthy, wealthy, and stable world is good for America, and a stable and strong IFC is in the interest of the United States.

II. MDBs ARE FUNDAMENTALLY DIFFERENT FROM SOVEREIGNS.

Sovereign states and MDBs are different entities with different functions. Sovereign states are independent, self-interested actors. MDBs, by definition, are not. They are comprised of independent, self-interested member states and must "serve as the instrumentalities of many nations" all at once. Br. United States, *Veiga v. World Meteorological Organization*, 2009 WL 8186687, No. 08-3999-cv (2d Cir. Mar. 3, 2010).

It follows that MDBs like IFC do not advance the goals of any single member state. Rather, the various independent states—including the United States—that comprise the collective body that is IFC agree that IFC's purpose is "to further economic development by

encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas . . . ." Articles of Agreement of the International Finance Corporation, Art. I, 7 U.S.T. 2197 (July 20, 1956). Various provisions of IFC's Articles reflect this multilateral purpose and prevent IFC from acting as an arm of any particular state. For example, IFC's officers are committed to IFC, not any particular nation: "The President, officers and staff of the [IFC], in the discharge of their offices, owe their duty entirely to the [IFC] and to no other authority. Each member of the [IFC] shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties." *Id.* Art. IV(5)(c). One of IFC's Operational Principles is that IFC "shall impose no conditions that the proceeds of any financing by it shall be spent in the territories of any particular country." *Id.* Art. III(3)(iii). IFC also refrains from political activity: IFC and its officers "shall not interfere in the political affairs of any member, nor shall they be influenced in their decisions by the political character of the member or members concerned." *Id.* Art. III(9).

In addition, MDBs differ structurally from states in fundamental ways. "The most significant difference between states and international organizations lies in the fact that states possess the totality of international rights and duties, while international organizations possess only those rights and duties that are established by treaty, functionally necessary, or developed by practice." Charles H. Brower, II, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, 41 VA. J. INT'L L. 1, 16 (Fall 2000). "Therefore, we should not be surprised that they require different kinds of immunity than states do." *Id.* at 17.

In short, the character of international organizations—even those engaged in activities of a financial nature—is fundamentally different from that of sovereign states. When an MDB engages in financial activity in furtherance of its purposes, it is not acting as a self-interested sovereign or even at the behest of one. Accordingly, immunity for MDBs serves a fundamentally different purpose from immunity for states—to provide "[c]omplete independence from the local authority . . . in order to enable [them] to fulfill [their] international functions." Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 AM. J. INT'L L. 828, 836, 847 (1947).

III. IMMUNITY IS NECESSARY FOR IFC TO PERFORM ITS MISSION.

The fact that international organizations ("IOs") require immunity from suit in order to perform their functions is well-established. "The strong foundation in international law for the privileges and immunities accorded to international organizations denotes the fundamental importance of these immunities to the growing efforts to achieve coordinated international action through multinational organizations with specific missions." *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983). Without immunity, not only would organizations be hampered by facing litigation over the performance of their functions, but their independence would be undermined by submission to suit in local jurisdictions:

> [T]he very structure of an international organization, which ordinarily consists of an administrative body created by the joint action of several participating nations, requires that the organization remain independent

> from the intranational policies of its individual members.

Id. at 615.

IFC's need for immunity is particularly strong. IFC provides financing to projects in the developing world "when other sources of funds are not available on reasonable terms." *International Finance Corporation: Hearings on S. 1894 before International Finance Subcomm. of S. Comm. On Banking and Currency*, 84th Conf. 3 (1955) (Message of the President). These projects are inherently risky. If in addition to this financial risk IFC also faced civil liability based on those projects, it may be unable to provide financing in the first place, especially in the regions that need it most. *See Jam v. Int'l Fin. Corp.*, 172 F. Supp. 3d 104, 110-11 (D.D.C. 2016) (seeing "little reason to doubt" that a lack of immunity would "produce a considerable chilling effect on IFC's capacity and willingness to lend money in developing countries").

Without immunity, IFC's priorities could shift. IFC might be forced to adopt defensive tactics both financially and strategically. And investor states might re-evaluate their monetary contribution to IFC if an increasing percentage of that investment were subject to attorney's fees, settlements, and defense-related costs rather than global strategic development objectives. With fewer dollars coming in due to investor risk aversion and more dollars going out to satisfy litigation-related costs, pressure from both sides could degrade IFC's ability to fulfill its mission. That development would reduce the effectiveness of a key mechanism for the U.S. to exert global influence and achieve its critical policy goals.

This would be highly unfortunate, especially where potential liability is based on IFC's alleged failure to meet its own ideals, for example, as set forth in the Environmental and Social Sustainability Standards invoked in this case. Indeed, a collateral consequence of imposing liability for failure to meet its own standards is that IFC may refrain from setting such standards at all.

IV. A RESTRICTIVE IMMUNITY REGIME WOULD OPEN IFC AND OTHER MDBs TO BURDENSOME LITIGATION THAT WOULD DIVERT RESOURCES FROM THEIR MISSION.

Reducing the immunity of MDBs would subject them to a new risk of U.S. lawsuits merely for pursuing their internationally-agreed mission. Any time a plaintiff has a claim arising out of a project receiving MDB financing, the plaintiff would have the incentive to sue a deep-pocketed entity. And because the MDB was involved in providing financing, the plaintiff would argue that the MDB should not be immune for such alleged "commercial activity" under the Foreign Sovereign Immunities Act.

For MDBs headquartered in the U.S. (like IFC and the World Bank), there is a serious risk that courts will find the required U.S. nexus to provide U.S. jurisdiction for a court to consider such a claim. Petitioners here have made this very argument. (*See* Petitioners' D.C. Circuit Brief, at 40-41.) If having a U.S. headquarters opened MDBs to burdensome suits from around the world, an MDB might very well be dissuaded from having a U.S. headquarters at all—a point invoked during congressional debate on providing immunity to the United Nations Organization. *See, e.g.*, 91 CONG. REC. 10866, 10866 (Nov. 20, 1945)

("[I]f we are to hope to have the United Nations Organization's headquarters to be located in the United States, it will be absolutely essential for this [IOIA] type of legislation to be passed."). This would disadvantage the United States with respect to such organizations, reducing the substantial leverage the United States now enjoys to "help shape the global development agenda, leveraging its investments to ensure effectiveness and on-the-ground impact." U.S. DEP'T OF THE TREASURY, RESOURCE CENTER: MULTILATERAL DEVELOPMENT BANKS, https://www.treasury.gov/resource-center/international/development-banks/Pages/index.aspx (last visited Sept. 14, 2018).

If they were subject to this threat of private civil litigation, MDBs would have to devote substantial financial and managerial resources to defend those lawsuits, which in turn would divert resources from their institutional missions. Tort litigation arising out of injuries in foreign countries is particularly costly and burdensome. And injunctive relief, such as that requested here, would allow private plaintiffs and courts to insert themselves as micromanagers of complex, technical, and expensive projects. Having to defend these suits, no matter how meritless they might be, would defeat the purpose of International Organizations Immunities Act ("IOIA") immunity.

For this reason, "IOIA immunity, where justly invoked, properly shields defendants not only from the consequences of litigation's results but also from the burden of defending themselves." *Zuza v. Office of the High Representative*, 857 F.3d 935, 938 (D.C. Cir. 2017) (internal quotation marks omitted); *see also Rendall-Speranza v. Nassim*, 107 F.3d 913, 916-17 (D.C. Cir. 1997) ("Immunity protects the defendant not only from liability upon the merits of the claim against

it but also from the burden of standing trial in the first place.") (addressing immunity of an IFC official).

This new burden would be especially problematic in light of MDBs' historical reliance on full immunity. A new rule developed case-by-case in the courts, rather than through the political process and legislation, would subject MDBs to substantial uncertainty about their legal status and protection. In short, a new immunity rule developed in this manner would destabilize MDBs' decision-making processes—including for projects already funded. Grappling with uncertain legal change and new legal risk would divert scarce MDB resources from organizations' core development mission.

V. THE JUDICIARY SHOULD NOT UPEND THE WELL-ESTABLISHED UNDERSTANDING THAT MDBs ENJOY ABSOLUTE IMMUNITY.

Amici recommend caution before adopting a wholesale change in the decades-long understanding of the immunity enjoyed by MDBs and other IOs. Stability in the understanding of fundamental rules such as the immunity of MDBs is critical to the function of those institutions. If a change in a bedrock rule regarding the legal status of MDBs is to occur, it should be through the political branches, not the courts.

A. The Need For IO Immunity Has Long Been Recognized.

The international community agreed from the outset that international organizations like IFC would be answerable to their member countries alone, acting through their representatives on their Boards, and free from local control.

These principles are expressed in the Secretary of State's 1945 Report to the President regarding the formation of the United Nations. The Secretary noted that while international organizations were "relatively new" and so the "exact nature" of the immunities to which they are entitled was not yet clear, certain immunities would be "necessary." U.S. Dep't of State, Charter of the United Nations: Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, The Secretary of State 158, Pub. 2349, Conference Series 71 (June 26, 1945). For example:

> The United Nations, being an organization of all of the member states, is clearly not subject to the jurisdiction or control of any one of them and the same will be true for the officials of the Organization. The problem will be particularly important in connection with the relationship between the United Nations and the country in which it has its seat. . . . *The United States shares the interest of all Members in seeing that no state hampers the work of the Organization through the imposition of unnecessary local burdens.*

Id. at 159 (emphasis added). And Congress' interest in supporting IOs extended not only to the United Nations, but all organizations of which the U.S. was a member, including international financial institutions like the IMF and the World Bank. *See* S. REP. NO. 79-861 (1945), at 2.

B. The IOIA Was Enacted Against The Backdrop Of This International Understanding.

"The fundamental hypothesis upon which all of the jurisdictions base their [immunity-conferring] provisions is not disputed. International organizations must remain free from national interference so that they might be permitted to carry out their functions." Edwin H. Fedder, *The Functional Basis of Int'l Privileges & Immunities: A New Concept in International Law and Organization*, 9 AM. U. L. REV. 60, 69 (1964). This international consensus was the context in which the IOIA was enacted, in part to demonstrate the United States' commitment to it. Thus, IOIA immunity was intended to "protect the official character of" and "strengthen the position of" international organizations. S. REP. NO. 79-861, at 2. And it was well understood when the IOIA was enacted that IOs were to enjoy virtually absolute immunity. *See* Letter from Robert B. Owen, State Dep't Legal Adviser, to Leroy D. Clark, Gen. Counsel, Equal Emp't Opportunity Comm'n (June 24, 1980) ("At the time the IOIA was enacted, foreign governments (and, by virtue of the IOIA, international organizations) were entitled, as a general matter to absolute immunity from proceedings in our courts."), in Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 917, 918 (1980); *see also Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998) ("Congress' intent [in the IOIA] was to adopt that body of law only as it existed in 1945—when immunity of sovereigns was absolute.").

C. IFC Has Long Been Understood To Enjoy Immunity From Suit, And The Judiciary Should Not Change This Stable Legal Status.

IFC was established against this same background, and its articles accordingly provided for this well-understood immunity from suit. *See* Articles of Agreement of the International Finance Corporation, Art. VI(1), 7 U.S.T. 2197 (providing that the immunities set forth therein are intended "[t]o enable [IFC] to fulfill the functions with which it is entrusted"). This understanding has been borne out in litigation, as IFC has repeatedly and successfully invoked immunity from suits by persons who were not IFC's commercial counterparties. *See, e.g.*, *Rendall-Speranza*, 107 F.3d at 915 (IFC successfully invoked immunity with respect to employment-related tort claims); *In re Dinastia, L.P.*, 381 B.R. 512 (S.D. Tex. 2007) (IFC successfully invoked immunity against claim by assignee of a creditor of an IFC borrower); *Banco de Seguros del Estado v. Int'l Fin. Corp.*, Nos. 06 Civ. 2427(LAP), 06 Civ. 3739(LAP), 2007 WL 2746808, at *5-6 (S.D.N.Y. Sept. 20, 2007) (IFC successfully invoked immunity against claims by "tenuously related" commercial parties).

Stability in the status of and rights afforded to MDBs is critical to their function. IFC and other MDBs were established and chose to locate in the United States with an understanding that they would be absolutely immune from suit, and they have operated with that understanding ever since. That immunity was granted, after deliberation, by Act of Congress and by Order of the President. If a fundamental change such as the removal of immunity is to occur, it should only be through the deliberation

of those same political branches, not at the behest of private litigants.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the D.C. Circuit.

Respectfully submitted,

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No. 17-1011

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, et al.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, ET AL., IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	7
I. CONGRESS PROVIDED FOR VIRTUALLY ABSOLUTE IMMUNITY FOR DESIGNATED INTERNATIONAL ORGANIZATIONS AND DID NOT INTEND TO INCORPORATE THE RESTRICTIVE FOREIGN SOVEREIGN IMMUNITY CODIFIED DECADES LATER IN THE FSIA	7
II. UNDER THE DEFAULT RULE OF VIRTUALLY ABSOLUTE IMMUNITY, DESIGNATED INTERNATIONAL ORGANIZATIONS MAY EXPRESSLY WAIVE THEIR IMMUNITY	12
III. TETHERING THE JURISDICTIONAL IMMUNITY OF INTERNATIONAL ORGANIZATIONS UNDER THE IOIA TO THE FSIA WOULD ENCOURAGE A SURGE OF LAWSUITS, CREATE SIGNIFICANT UNCERTAINTY IN THE OVERALL INERPRETATION OF THE IOIA, AND HARM THE OPERATIONS OF MDBS	15
CONCLUSION	25

TABLE OF AUTHORITIES

CASES — Page

Aguado v. *Inter-Am. Dev. Bank*, 85 F. App'x 776 (D.C. Cir. 2004) 19
Alfred Dunhill of London, Inc. v. *Republic of Cuba*, 425 U.S. 682 (1976) 7, 8
Atkinson v. *Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998) 5
Broadbent v. *Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) 9
Dujardin v. *Int'l Bank for Reconstruction & Dev.*, 9 F. App'x 19 (D.C. Cir. 2001) 19
Garcia v. *Sebelius*, 919 F. Supp. 2d 43 (D.D.C. 2013) 18
Hudes v. *Aetna Life Ins. Co.*, 493 F. App'x 107 (D.C. Cir. 2012) 19
Hudes v. *Aetna Life Ins. Co.*, 806 F. Supp. 2d 180 (D.D.C. 2011) 15
Jesner v. *Arab Bank, PLC*, 138 S. Ct. 1386 (2018) 16
Mendaro v. *World Bank*, 717 F.2d 610 (D.C. Cir. 1983) 10, 11, 13, 25
Nyambal v. *Int'l Monetary Fund*, 772 F.3d 277 (D.C. Cir. 2014) 17
OSS Nokalva, Inc. v. *European Space Agency*, 617 F.3d 759 (3d Cir. 2010) 5, 21
Osseiran v. *Int'l Fin. Corp.*, 552 F.3d 836 (D.C. Cir. 2009) 15
Republic of Argentina v. *Weltover, Inc.*, 504 U.S. 607 (1992) 21
RJR Nabisco, Inc. v. *European Cmty.*, 136 S. Ct. 2090 (2016) 16
Samantar v. *Yousuf*, 560 U.S. 305 (2010) ... 9
Sampaio v. *Inter-Am. Dev. Bank*, 468 F. App'x 10 (D.C. Cir. 2012) 19

TABLE OF AUTHORITIES—continued

Page

Smith v. *World Bank Group*, 694 F. App'x 1 (D.C. Cir. 2017) 19
Tuck v. *Pan Am. Health Org.*, 668 F.2d 547 (D.C. Cir. 1981) 18
Verlinden B.V. v. *Cent. Bank of Nigeria*, 461 U.S. 480 (1983) 7
Vila v. *Inter-Am. Inv., Corp.*, 570 F.3d 274 (D.C. Cir. 2009) 15, 19

STATUTES

22 U.S.C. § 288a 7, 23
28 U.S.C. § 1605 ..... 15, 22
28 U.S.C. § 1611(a) 8

PRESIDENTIAL DOCUMENTS

Exec. Order No. 9,751, 11 Fed. Reg. 7,713 (July 11, 1946) 4, 17
Exec. Order No. 10,873, 25 Fed. Reg. 3,097 (Apr. 8, 1960) 3, 18
Exec. Order No. 11,334, 32 Fed. Reg. 3,933 (Mar. 7, 1967) 2, 18
Exec. Order No. 12,403, 48 Fed. Reg. 6,087 (Feb. 8, 1983) 2, 18
Exec. Order No. 12,567, 51 Fed. Reg. 35,495 (Oct. 2, 1986) 4, 18
Exec. Order No. 12,766, 56 Fed. Reg. 28,463 (June 18, 1991) 3, 18

INTERNATIONAL MATERIALS

Amaratunga v. *Nw. Atl. Fisheries Org.*, [2013] S.C.R. 866 (Can.) 10

TABLE OF AUTHORITIES—continued

Page

Agreement Establishing the African Development Bank, Aug. 4, 1963, 569 U.N.T.S. 353 14

Agreement Establishing the Asian Development Bank, *opened for signature* Dec. 4, 1965, T.I.A.S. No. 6,103 14

Articles of Agreement of the International Bank for Reconstruction and Development, *opened for signature* Dec. 27, 1945, T.I.A.S. No. 1,502 ..... 9, 11, 13, 23

Articles of Agreement of the International Finance Corporation, *submitted* May 25, 1955, T.I.A.S. No. 3,620 14

Articles of Agreement of the International Monetary Fund, *opened for signature* Dec. 27, 1945, T.I.A.S. No. 1,501 14

Convention Establishing the Multilateral Investment Guarantee Agency, *submitted* Oct. 11, 1985, T.I.A.S. No. 12,089 11

Convention on the Privileges and Immunities of the United Nations, *adopted* Feb. 13, 1946, T.I.A.S. No. 6,900 11

U.N. Charter 9

Waite v. *Germany*, 1999-I Eur. Ct. H.R. 393. 10

World Bank Group v. *Wallace*, [2016] S.C.R. 207 (Can.) 10

SCHOLARLY AUTHORITIES

C. Wilfred Jenks, *International Immunities* (1961) 10

TABLE OF AUTHORITIES—continued

Page

Edward Chukwuemeke Okeke, *Annex VI—International Bank for Reconstruction and Development, in The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary* (August Reinisch ed., 2016) 13, 14

Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* (2018)..... 10

Gerald M. Meier, *The Bretton Woods Agreement— Twenty-five Years After*, 23 Stan. L. Rev. 235 (1971)..... 13

Jurisdictional Immunities of Intergovernmental Organizations, 91 Yale L.J. 1167 (1982) 7, 9

COURT DOCUMENTS

Brief *Amici Curiae* of Center for International Environmental Law, *Jam* v. *Int'l Fin. Corp.*, No. 17-1011 (July 31, 2018) 19

Brief *Amicus Curiae* of United States, *Jam* v. *Int'l Fin. Corp.*, No. 17-1011 (July 31, 2018) 22

Brief for Respondent, *Jam* v. *Int'l Fin. Corp.*, No. 17-1011 (Sept. 10, 2018)..... 8

Complaint, *Jam* v. *Int'l Fin. Corp.*, No. 15-cv-612-JDB (D.D.C. Apr. 23, 2015)..... 22, 24

First Amended Complaint, *Juana Doe* v. *Int'l Fin. Corp.*, No. 17-cv-1494 (D. Del. Mar. 8, 2018) 16

TABLE OF AUTHORITIES—continued

Page

Oral Argument Transcript, *Jam* v. *Int'l Fin. Corp.*, No. 16-7051 (D.C. Cir. Feb. 6, 2017) 17

Reply Brief for Petitioners, *Jam* v. *Int'l Fin. Corp.*, No. 17-1011 (Apr. 18, 2018) ... 22

OTHER AUTHORITIES

African Development Bank Group, *Independent Development Evaluation*, https://www.afdb.org/en/about-us/organisational-structure/independent-development-evaluation/ 20

Asian Development Bank, *Accountability Mechanism*, https://www.adb.org/site/accountability-mechanism/main 20

Black Sea Trade and Development Bank, *Procedure for the Receipt, Retention and Treatment of Complaints at the Black Sea Trade and Development Bank*, https://www.bstdb.org/Procedure_for_the_Receipt_Retention_and_Treatment_of_Complaints.pdf 20

Caribbean Development Bank, *Contact Us – Reporting Fraud, Corruption and Ethics Violations*, http://www.caribank.org/about-cdb/contact-us 20

European Bank for Reconstruction and Development, *Chairman's Report on the Agreement Establishing the European Bank for Reconstruction and Development* (Apr. 1991), *reprinted in Basic Documents of the EBRD* (Sept. 2013) 14

TABLE OF AUTHORITIES—continued

Page

European Bank for Reconstruction and Development, *Project Complaint Mechanism*, https://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism.html 20

Inter-American Development Bank, *The Independent Consultation and Investigation Mechanism*, https://www.iadb.org/en/mici 20

Nordic Investment Bank, *Report Misconduct, Corruption and Non-compliance*, https://www.nib.int/contacts/report_misconduct_corruption 20

Restatement (Third) of the Foreign Relations Law of the United States (Am. Law Inst. 1987) 9, 13

S. Rep. 79-861 (1945) 7, 8

World Bank, *About the World Bank*, http://www.worldbank.org/en/about 4

World Bank – IBRD & IDA, *The Inspection Panel*, http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx 20

INTEREST OF *AMICI CURIAE*[1]

Amici are multilateral development banks ("MDBs") that have an interest in the proper determination of the sources and scope of the immunity of international organizations under domestic law. MDBs are international organizations that emerged from the post-World War II international order to provide financial and technical assistance in the pursuit of social and economic development around the world. MDBs play a vital role in the global economy and depend on their privileges and immunities in order to pursue their missions.

Amici submit this brief in support of respondent because the International Organizations Immunities Act of 1945, 22 U.S.C. § 288 et seq., is a critical (although not exclusive) component of the privileges and immunities of MDBs and other international organizations with ties to the United States. *Amici* include:

The African Development Bank Group, composed of the African Development Bank, the African Development Fund, and the Nigeria Trust Fund, and constituted by 80 member countries, aims to contribute to the sustainable economic development and social progress of its regional members. It achieves its mission by mobilizing and allocating resources for investments in its regional member countries and providing policy advice and technical assistance. The

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from counsel for *amici curiae* made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3(a), *amici curiae* state that counsel for all parties consented to the filing of this brief.

African Development Bank is designated as a public international organization under the IOIA. Exec. Order No. 12,403, 48 Fed. Reg. 6,087 (Feb. 8, 1983).

The Asian Development Bank, constituted by 67 member countries, aims to promote economic growth and cooperation in Asia and the Pacific by providing loans, technical assistance, grants and equity investments. It is designated as a public international organization under the IOIA. Exec. Order No. 11,334, 32 Fed. Reg. 3,933 (Mar. 7, 1967).

The Black Sea Trade and Development Bank, constituted by 11 member countries, supports economic development and regional cooperation through trade, project finance lending, guarantees, and equity participation in private enterprises and public entities in member countries.

The Caribbean Development Bank, constituted by 28 member countries, seeks to reduce poverty in the Caribbean through social and economic development. It promotes public and private investment, provides technical assistance, and helps members optimize the use of their resources to develop their economies and expand production and trade.

The Council of Europe Development Bank, constituted by 41 member countries, promotes social cohesion and strengthens social integration in Europe through financing and technical expertise for projects with a high social impact in its member states. It also responds to emergency situations, and works to improve the living conditions of disadvantaged population groups.

The European Bank for Reconstruction and Development is constituted by 67 member states, the European Union, and the European Investment Bank; its purpose is to foster the transition towards

open market-oriented economies and to promote private and entrepreneurial initiative in its recipient member countries committed to and applying the principles of multiparty democracy, pluralism and market economics. It is designated as a public international organization under the IOIA. Exec. Order No. 12,766, 56 Fed. Reg. 28,463 (June 18, 1991).

The Inter-American Development Bank, constituted by 48 member countries, has the purpose of contributing to the acceleration of the process of economic and social development of its regional developing member countries in Latin America and the Caribbean, individually and collectively. It makes loans and guarantees to the governments, as well as governmental entities, enterprises, and development institutions of its borrowing member countries to help meet their development needs. It also provides technical assistance to its borrowing member countries that focuses on transferring knowledge and supports project preparation, feasibility studies, regional programs, and training. It is designated as a public international organization under the IOIA. Exec. Order No. 10,873, 25 Fed. Reg. 3,097 (Apr. 8, 1960) (as amended in Exec. Order No. 11,019, 27 Fed. Reg. 4,145 (Apr. 27, 1962)).

The Inter-American Investment Corporation, constituted by 45 member countries, is a multilateral development bank established to promote the economic development of its regional developing member countries by encouraging the establishment, expansion, and modernization of private enterprises (including those that are small and medium-scale), and partially and wholly owned state enterprises (excluding operations with subsovereign governments) that are aligned with certain priority business areas, to supplement the activities of the Inter-American De-

velopment Bank. It is designated as a public international organization under the IOIA. Exec. Order No. 12,567, 51 Fed. Reg. 35,495 (Oct. 2, 1986).

The International Bank for Reconstruction and Development ("IBRD"), constituted by 189 member countries, helps developing countries reduce poverty, promote economic growth, and build prosperity. It provides financial resources, knowledge and technical services, and strategic advice to developing countries, including middle income and credit-worthy lower income countries. It is designated as a public international organization under the IOIA. Exec. Order No. 9,751, 11 Fed. Reg. 7,713 (July 11, 1946). IBRD and the International Development Association ("IDA") compromise what is typically referred to as the World Bank. See World Bank, *About the World Bank*, http://www.worldbank.org/en/about.

The Nordic Investment Bank, constituted by eight member countries, envisions a prosperous and environmentally sustainable Nordic-Baltic region. It achieves its vision by financing projects both within and outside its membership that improve productivity and benefit the environment, and by offering long-term loans and guarantees to ensure sustainable growth.

SUMMARY OF THE ARGUMENT

MDBs and other international organizations exist in order to address global and regional challenges in a multilateral fashion. Because these organizations must be independent from their member states and free from member state interference to function properly, they enjoy under both international and domestic law the privileges and immunities necessary to achieve their stated purposes. This includes immunity from suit and legal process. In the United

States, the primary source of immunity for most international organizations under domestic law is the IOIA.

For at least the past twenty years, the D.C. Circuit has held that in drafting the IOIA, Congress did not intend to incorporate subsequent changes to the immunity of foreign sovereigns codified in the Foreign Sovereign Immunities Act ("FSIA"). See *Atkinson* v. *Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998). This has led to a stable jurisprudence of international organization immunity, under which organizations are generally immune from suit and judicial process absent waiver. Many international organizations with offices or operations in the United States are based in the District of Columbia and have relied on the D.C. Circuit's immunity jurisprudence in structuring and running their operations.

Petitioners now ask the Court to set aside over twenty years of precedent. Petitioners argue in favor of a new rule under which the IOIA would be read to incorporate the current contours of foreign sovereign immunity in the FSIA. A lone Court of Appeals—with little experience hearing cases involving international organizations and their immunities—has agreed. See *OSS Nokalva, Inc.* v. *European Space Agency*, 617 F.3d 759 (3d Cir. 2010). The effects of this proposed rule are untested and its legal underpinnings are unsound.

First, the language, context, and history of the IOIA demonstrate that Congress did not permanently link the scope of international organization immunity and the scope of foreign sovereign immunity. These immunities serve fundamentally different purposes that, in the case of foreign sovereign immunity, have evolved over time and for good reason. Yet those reasons do not pertain to the scope and nature of the

work of the MDBs and similar international institutions that are the product of carefully negotiated treaties among the member states.

Second, the IOIA established a default rule of virtually absolute immunity where international organizations would have the discretion to opt out and waive immunity when necessary to achieve their international missions. MDBs are representative of this design, as many have enacted via their founding treaties a limited waiver of immunity for claims brought by bondholders, creditors, and other contracting parties.

Third, jettisoning the D.C. Circuit's longstanding interpretation of the IOIA would create real and significant challenges for MDBs with a presence in the United States. The predictable result of petitioners' proposed rule will be more lawsuits brought against MDBs. What is less predictable is how courts will resolve many of the thorny interpretative issues that are inherent in trying to harmonize the IOIA with the rules for foreign sovereign immunity provided in the FSIA. MDBs ultimately will shoulder the burden of uncertainty and increased financial and operational costs of the ensuing litigation, diverting time and resources away from the pursuit of their agreed-upon mission of economic development.

ARGUMENT

I. CONGRESS PROVIDED FOR VIRTUALLY ABSOLUTE IMMUNITY FOR DESIGNATED INTERNATIONAL ORGANIZATIONS AND DID NOT INTEND TO INCORPORATE THE RESTRICTIVE FOREIGN SOVEREIGN IMMUNITY CODIFIED DECADES LATER IN THE FSIA.

In defining the scope of international organization immunity under the IOIA, Congress used an analogy to "the same immunity from suit . . . as is enjoyed by foreign governments" in order to give international organizations the maximum immunity then allowable under law. 22 U.S.C. § 288a(b). At the time of the IOIA's passage in 1945, the common-law principles of foreign sovereign immunity generally granted foreign sovereigns absolute immunity from suit. See *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983); *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 712 (1976); *Jurisdictional Immunities of Intergovernmental Organizations*, 91 Yale L.J. 1167, 1167 (1982) ("In 1945 . . . foreign governments were absolutely immune from the jurisdiction of both state and federal courts in the United States.").

The IOIA's purpose was to confer "privileges and immunities of a governmental *nature*" upon international organizations and thus not to link forever the two forms of immunity. S. Rep. 79-861, at 1 (1945) (emphasis added). As Congress explained in passing the IOIA, extending privileges and immunities to international organizations under domestic law "will not only protect the official character of public international organizations located in this country but it will also tend to strengthen the position of international organizations of which the United States is a

member when they are located or carry on activities in other countries." *Id.* at 2.

Following the IOIA's passage, the paths of foreign sovereign immunity and international organization immunity diverged. As sovereigns participated more frequently in international commercial markets, the State Department saw the need to distinguish between the public and private acts of sovereigns when resolving claims of sovereign immunity. *Alfred Dunhill of London, Inc.*, 425 U.S. at 703-04.

Over time, the federal common-law of foreign sovereign immunity came to recognize several exceptions, which were eventually codified by Congress in the Foreign Sovereign Immunities Act ("FSIA") of 1976. Tellingly, the FSIA did not explicitly contemplate any change in the scope of international organization immunity under the IOIA. The FSIA's sole reference to the IOIA was to provide that the property of an international organization may not be subject to attachment in order to fulfill a judgment against a foreign state. 28 U.S.C. § 1611(a). Such a reservation makes no sense if Congress had in fact meant to make the IOIA-protected entities' immune only to the extent that foreign governments are.

As discussed in respondent's brief, the text, structure, and history of the IOIA together make clear that Congress did not intend to incorporate into the IOIA the changes in the law of foreign sovereign immunity that culminated with the FSIA. Brief for Respondent at 18-39, *Jam* v. *Int'l Fin. Corp.*, No. 17-1011 (Sept. 10, 2018). Even if the Congress of 1945 could have foreseen the emergence of the FSIA in 1976, the FSIA would have been a poor fit for international organizations because the purposes underlying foreign sovereign immunity and international organization immunity are fundamentally distinct. See

Note, *Jurisdictional Immunities of Intergovernmental Organizations*, *supra* at 1170-71 ("Because the IOIA immunities were . . . tailored to specific organizations and situations, they are different from the immunities of foreign governments, which are laid down by general international or national law, and are grounded on considerations such as reciprocity that do not apply to IGOs.") (citations omitted).

Foreign sovereign immunity has been traditionally granted as a "matter of grace and comity" between co-equal sovereigns. *Samantar* v. *Yousuf*, 560 U.S. 305, 311 (2010) (quoting *Verlinden B.V.*, 461 U.S. at 486). In contrast, the immunities of international organizations are functional in nature. International organizations are generally granted such privileges and immunities by their member states as are necessary for the fulfillment of their purposes. See *Restatement (Third) of the Foreign Relations Law of the United States* § 467(1) (Am. Law Inst. 1987); Articles of Agreement of the International Bank for Reconstruction and Development art. 7, § 1, *opened for signature* Dec. 27, 1945, T.I.A.S. No. 1,502 ("To enable the Bank to fulfill the functions with which it is entrusted, the status, immunities and privileges set forth in this Article shall be accorded to the Bank in the territories of each member."); U.N. Charter art. 105 (the United Nations "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes").

The functional need for international organization immunities stems from the fact that the operations of international organizations are susceptible to attempted interference by member states. See *Broadbent* v. *Org. of Am. States*, 628 F.2d 27, 34 (D.C. Cir. 1980) ("The United States has accepted without qualification the principles that international organiza-

tions must be free to perform their functions and that no member state may take action to hinder the organization."); C. Wilfred Jenks, *International Immunities* 166 (1961) ("The basic function of . . . immunities is to bridle the sovereignty of States in their treatment of international organisations."); Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* 237-42 (2018).[2]

International organizations have no territory of their own, and are dependent on countries to exercise restraint to ensure their independent operations. They lack the co-equal standing with sovereigns that would hypothetically entitle them to certain inherent rights or comity under the law of nations. The immunities provided to international organizations—in particular, immunity from suit and legal process—thus "protect international organizations from unilateral control by a member nation over the activities of the international organization within its territory." *Mendaro* v. *World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983). They protect international organizations from antagonistic member states who might otherwise seek advantage in inter-state conflicts by interfering with their neutral operation. Without immunity, lo-

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[2] Decisions of foreign courts have made this same point. *See World Bank Group* v. *Wallace*, [2016] S.C.R. 207 ¶ 93 (Can.) ("It is part of the original agreement that in exchange for admission to the international organization, every member state agrees to accept the concept of collective governance. As a result, no single member can attempt to control the institution . . . ."); *Amaratunga* v. *Nw. Atl. Fisheries Org.*, [2013] S.C.R. 866 ¶ 1 (Can.) (noting that immunity is critical to "avoid undue interference in the operations" of the organization); *Waite* v. *Germany*, 1991-I Eur. Ct. H.R. 393, 409 ¶ 63 ("[T]he attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.").

cal courts would have the ability to influence the internal decision-making processes of international organizations. Further, "[d]enial of immunity opens the door to divided decisions of the courts of different member states passing judgment on the rules, regulations and decisions of the international bodies." *Id.* at 616.[3]

As holders of significant capital and development authority, MDBs are subject to the real world risks of a member state attempting to exert undue influence and control. MDBs engage in an independent evaluation of every investment and its possibility to promote economic development. Indeed, many MDBs are duty bound by their founding treaties to set aside politics when making these decisions. *E.g.*, Convention Establishing the Multilateral Investment Guarantee Agency art. 34, *submitted* Oct. 11, 1985, T.I.A.S. No. 12,089 ("The Agency, its President, and staff . . . shall not be influenced in their decisions by the political character of the member or members concerned."). Accordingly, the investment decisions made by MDBs

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[3] International organizations are also structured through their treaties so as to remain insulated from potentially disruptive national interference. For example, many require that disputes over the interpretation of the founding treaty—including disputes over the scope of immunity—be resolved internally by the organization or, in some cases, be referred to an international court. *See* Articles of Agreement of the International Bank for Reconstruction and Development art. 9 ("Any question of interpretation of the provisions of this Agreement arising between any member and the Bank or between any members of the Bank shall be submitted to the Executive Directors for their decision."); Convention on the Privileges and Immunities of the United Nations art. 8 § 30, *adopted* Feb. 13, 1946, T.I.A.S. No. 6,900 ("All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement.").

must reflect the *collective* will of the member states without regard to the preferences of any one member. If one member state gained an outsized voice in the process, that state could direct investments to itself and its allies while exacting financial punishment on its enemies.

II. UNDER THE DEFAULT RULE OF VIRTUALLY ABSOLUTE IMMUNITY, DESIGNATED INTERNATIONAL ORGANIZATIONS MAY EXPRESSLY WAIVE THEIR IMMUNITY.

As with all default rules, international organizations can waive the virtually absolute immunity provided by the IOIA in relation to a particular lawsuit or a particular type of lawsuit. This discretion can be exercised in a particular case, but it is most often expressed through the treaty drafting process where member states agree on the scope of immunity for a particular organization.

While the interpretation of the scope of an international organization's waiver of immunity is not an issue before the Court in this case, it is important to note that international organizations do voluntarily submit to suit when their articles or governing bodies allow such suits. See *Jam* v. *Int'l Fin. Corp.*, 138 S. Ct. 2026 (2018) (Mem.) (limiting the grant of certiorari to the interpretation of the IOIA). In line with the deeply functional nature of international organization immunity, such waivers are undertaken when necessary for the fulfilment of the purposes of the organization.

The founding treaties of some MDBs will permit suits by bondholders, creditors, and other contracting parties when necessary for MDBs to achieve their core missions. For example, the Articles of IBRD

provide for a limited waiver of immunity for certain claims. See Articles of Agreement of the International Bank for Reconstruction and Development art. 7, § 3. It is widely recognized that this language exists in order to effect and "enhance the marketability of [IBRD's] securities and the credibility of its activities in the lending markets." *Mendaro*, 717 F.2d at 618; see also *Restatement (Third) of Foreign Relations Law of the United States* § 467, Reporters' Note 3 (noting that "these provisions were designed to permit suits by bondholders and related creditors"); Edward Chukwuemeke Okeke, *Annex VI—International Bank for Reconstruction and Development, in The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary* (August Reinisch ed., 2016) (summarizing the historical evidence surrounding the drafting of the IBRD Articles and the interpretation of the Articles by courts in the United States).

This functional approach to immunities is a product of historical context. At the Bretton Woods Conference of 1944, delegates from the Allied nations drafted the Articles of Agreement for both IBRD and the International Monetary Fund ("IMF"). See Gerald M. Meier, *The Bretton Woods Agreement—Twenty-five Years After*, 23 Stan. L. Rev. 235, 237-43 (1971). IBRD was set up as an international financial institution that would raise capital and make long-term investments in development projects. IMF was primarily designed to facilitate the functioning of the international monetary system under a system of fixed exchange rates and given the authority to provide short term financing to member countries to resolve their balance of payment issues.

IBRD needed to issue securities and attract investments, so its Articles included a limited waiver of

its jurisdictional immunity. These same concerns did not apply to IMF and its Articles thus provide for absolute immunity from suit. See Articles of Agreement of the International Monetary Fund art. 9, § 3, *opened for signature* Dec. 27, 1945, T.I.A.S. No. 1,501; Okeke, *Annex VI—International Bank for Reconstruction and Development*, *supra* at 762.

Following Bretton Woods, many other MDBs included in their founding treaties language identical or similar to IBRD's Articles in order to preserve immunity except for a limited category of lawsuits. See Articles of Agreement of the International Finance Corporation art. 6, § 3, May 25, 1955, T.I.A.S. No. 3,620 (identical language to IBRD Articles); Agreement Establishing the African Development Bank art. 52, Aug. 4, 1963, 569 U.N.T.S. 353 ("The Bank shall enjoy immunity from every form of legal process except in cases arising out of the exercise of its borrowing powers . . ."); Agreement Establishing the Asian Development Bank art. 50, *opened for signature* Dec. 4, 1965, T.I.A.S. No. 6,103 ("The Bank shall enjoy immunity from every form of legal process, except in cases arising out of or in connection with the exercise of its powers to borrow money, to guarantee obligations, or to buy and sell or underwrite the sale of securities . . ."); European Bank for Reconstruction and Development, *Chairman's Report on the Agreement Establishing the European Bank for Reconstruction and Development*, art. 46 explanatory note (Apr. 1991), *reprinted in Basic Documents of the EBRD* (Sept. 2013) ("Delegates noted this Article [addressing immunity] was almost exactly the same as . . . the I.B.R.D.'s Articles of Agreement. They hoped that courts construing it would draw on the jurisprudence that had evolved in connection with the I.B.R.D.'s Articles.").

Incorporating this historical context, the D.C. Circuit has developed a predictable and workable test for deciding whether MDBs have waived immunity for purposes of the IOIA. Courts in the D.C. Circuit have generally found a waiver of immunity for claims related to external investing and borrowing activities, but not for claims related to the internal functions of the organizations. Compare *Vila* v. *Inter-Am. Inv., Corp.*, 570 F.3d 274, 279 (D.C. Cir. 2009) (unjust enrichment claim brought by an outside consultant who helped negotiate the terms of commercial lending agreements); *Osseiran* v. *Int'l Fin. Corp.*, 552 F.3d 836, 840 (D.C. Cir. 2009) (promissory estoppel and confidentiality claims brought by a prospective investor), with *Hudes* v. *Aetna Life Ins. Co.*, 806 F. Supp. 2d 180, 189 (D.D.C. 2011), *aff'd*, 493 F. App'x 107 (D.C. Cir. 2012) (wrongful termination suit).

III. TETHERING THE JURISDICTIONAL IMMUNITY OF INTERNATIONAL ORGANIZATIONS UNDER THE IOIA TO THE FSIA WOULD ENCOURAGE A SURGE OF LAWSUITS, CREATE SIGNIFICANT UNCERTAINTY IN THE OVERALL INTERPRETATION OF THE IOIA, AND HARM THE OPERATIONS OF MDBS.

A. *Exposure.* It is certain that more lawsuits would be filed against MDBs if the IOIA were interpreted to incorporate the exceptions to sovereign immunity outlined in the FSIA. Such a holding would be an invitation to enterprising plaintiff's counsel to fashion new and creative arguments as to why the actions of international organizations fall within any of the enumerated FSIA exceptions. 28 U.S.C. § 1605.

In particular, MDBs that invest in foreign companies and foreign projects would be attractive targets for "impact litigation" that could not be brought

against other defendants in the courts of the United States. Plaintiffs who could not sue a foreign corporation for alleged torts under the Alien Tort Statute, *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018), could nonetheless try under the FSIA to sue the MDB that invested in the foreign corporation or a particular project in which the foreign corporation was involved. Simply put, what plaintiffs were once unable to achieve through direct liability against the foreign company that allegedly harmed a local community, they will now pursue through indirect liability against their lenders, MDBs. Indeed, the group representing petitioners here has already filed a similar lawsuit in connection with loans IFC made to a company in Honduras. See First Amended Complaint, *Juana Doe* v. *Int'l Fin. Corp.*, No. 17-cv-1494 (D. Del. Mar. 8, 2018).

Courts in the United States will thus become involved in "foreign-cubed" litigation involving MDBs—foreign disputes involving foreign parties governed by foreign law. This resulting entanglement with foreign claims runs counter to the "basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.'" *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (quoting *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 454 (2007)).

The instant case is a sign of what is to come. Petitioners are Indian citizens; the developer and operator of the power plant is in India; the power plant is located in India; and the alleged environmental damage and disruption to the community are in India. But rather than seeking relief in India and bringing a lawsuit against the developer and operator of the power plant who would be directly responsible for any damage, petitioners brought this suit in a U.S. court

over 7,500 miles away against a non-U.S. entity that provided a minority share of the financing.[4]

To be sure, international organizations and MDBs have other lines of defense and will vigorously contest meritless charges.[5] These defenses might conceivably include *forum non conveniens* where a foreign forum is preferable, failure to join indispensable parties where plaintiffs fail to join the other defendants who participated in an investment project, personal jurisdiction where the organization had insufficient contact with the forum, and failure to state a claim. International organizations will also be able to assert treaty-based privileges and immunities that are independent of the immunities granted by the IOIA. See *Nyambal* v. *Int'l Monetary Fund*, 772 F.3d 277, 281 (D.C. Cir. 2014) (noting the "dual protections" afforded to an international organization by the IOIA and its founding treaty); Exec. Order No. 9,751, 11 Fed. Reg. 7,713 (July 11, 1946) (the designation of, among others, IBRD as a public international organization entitled to the immunities conferred by the IOIA was "not intended to abridge in any respect privileges and immunities which such organizations

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[4] When pressed at oral argument before the D.C. Circuit about why petitioners had not sought any relief in India, the response was to claim that the judicial system in India "takes forever" and "it is seen at least, if not actually seen as corrupt and in favor of huge . . . conglomerates." Oral Argument Transcript at 48, *Jam* v. *Int'l Fin. Corp.*, No. 16-7051 (D.C. Cir. Feb. 6, 2017).

[5] Any decision from this Court regarding the scope of the IOIA should avoid commenting on the availability of these other defenses. In particular, the interpretation of IFC's Articles of Agreement and the scope of its treaty-based privileges and immunities are issues that the Court explicitly declined to address when granting certiorari. *Jam* v. *Int'l Fin. Corp.*, 138 S. Ct. 2026 (2018) (Mem.).

have acquired or may acquire by treaty or congressional action").[6]

Yet other potential lines of defense will not relieve organizations of the burden of having to defend themselves in the first place. See *Tuck* v. *Pan Am. Health Org.*, 668 F.2d 547, 549 (D.C. Cir. 1981) (quoting *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967) (per curiam)) (immunity is meant to shield organizations "not only from the consequences of litigation's results but also from the burden of defending themselves"). Responding to litigation in order to assert immunities, let alone defending suits on their merits, is costly—it both consumes financial resources and detracts from the time and attention of management. Failing to respond to a lawsuit leaves international organizations vulnerable to default judgments and adverse rulings. See *Garcia* v. *Sebelius*, 919 F. Supp. 2d 43, 47 (D.D.C. 2013) (remarking that, although not mandatory, an appearance invoking immunity under the IOIA is advisable to avoid being subject to an entry of default and sanctions in the event a court determines an organization is not immune). Interna-

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[6] The text of this Executive Order is not exceptional. *See* Exec. Order No. 12,766, 56 Fed. Reg. 28,463 (June 18, 1991) (designating the European Bank for Reconstruction and Development as an international organization under the IOIA, and noting that "[t]his designation is not intended to abridge in any respect the privileges and immunities which such organization has acquired or may acquire by treaty . . . or congressional action"); Exec. Order No. 12,567, 51 Fed. Reg. 35,495 (Oct. 2, 1986) (for the Inter-American Investment Corporation); Exec. Order No. 12,403, 48 Fed. Reg. 6,087 (Feb. 8, 1983) (for the African Development Bank); Exec. Order No. 10,873, 25 Fed. Reg. 3,097 (Apr. 8, 1960) (as amended in Exec. Order No. 11,019, 27 Fed. Reg. 4,145 (Apr. 27, 1962)) (for the Inter-American Development Bank); Exec. Order No. 11,334, 32 Fed. Reg. 3,933 (Mar. 7, 1967) (for the Asian Development Bank).

tional organizations—and ultimately the member states who fund them—bear these costs when they respond to litigation.[7]

Petitioners' *amici* nonetheless suggest that MDBs could "ameliorate" concerns about the flood of lawsuits by "revising their non-judicial accountability mechanisms so that the institutions respond to complaints and grievances more fully." Brief *Amici Curiae* of Center for International Environmental Law at 29, *Jam* v. *Int'l Fin. Corp.*, No. 17-1011 (July 31, 2018). This argument incorrectly—and naively—assumes that valid claims underlie all lawsuits. MDBs cannot avoid frivolous litigation "by living a completely virtuous life." *Vila*, 570 F.3d at 289 (Williams, J., dissenting). And even if non-judicial accountability mechanisms were as robust as petitioners' amici imagine they might be, they would offer no protection from the type of suit brought here. The reality is that MDBs would face suits in any event.

This argument also misunderstands the intended role of the accountability mechanisms many MDBs have established for addressing internal or external

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[7] For example, even in the face of clear and controlling law demonstrating that international organizations are immune from suit in the employment context, MDBs have been forced to appear and respond to numerous employment suits. *See, e.g.*, *Smith* v. *World Bank Group*, 694 F. App'x 1 (D.C. Cir. 2017); *Hudes* v. *Aetna Life Ins. Co.*, 493 F. App'x 107 (D.C. Cir. 2012) (per curiam); *Sampaio* v. *Inter-Am. Dev. Bank*, 468 F. App'x 10 (D.C. Cir. 2012) (per curiam); *Aguado* v. *Inter-Am. Dev. Bank*, 85 F. App'x 776 (D.C. Cir. 2004) (per curiam); *Dujardin* v. *Int'l Bank for Reconstruction & Dev.*, 9 F. App'x 19 (D.C. Cir. 2001). A decision in petitioners' favor will no doubt give employees of international organizations additional incentive to redouble their efforts to try to fashion an exception to the IOIA for internal employment matters.

complaints.[8] These accountability mechanisms promote compliance with internal investment guidelines, policies, and procedures and ultimately keep MDBs accountable to the member states. The mechanisms were *not* designed to act as international claims tribunals awarding compensatory damages according to external standards. Moreover, opening the door to private lawsuits related to MDB investment decisions would unduly interfere with this internal conversation around compliance and punish MDBs for providing independent review of complaints.

B. *Interpretive Difficulties.* The wholesale incorporation of the FSIA into the IOIA would raise a host of difficult questions regarding how to apply a statute specifically crafted for sovereigns to international organizations in general and MDBs in particular. These interpretive challenges further confirm that, in

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[8] *See* African Development Bank Group, *Independent Development Evaluation*, https://www.afdb.org/en/about-us/organisational-structure/independent-development-evaluation/; Asian Development Bank, *Accountability Mechanism*, https://www.adb.org/site/accountability-mechanism/main; Black Sea Trade and Development Bank, *Procedure for the Receipt, Retention and Treatment of Complaints at the Black Sea Trade and Development Bank*, https://www.bstdb.org/Procedure_for_the_Receipt_Retention_and_Treatment_of_Complaints.pdf; Caribbean Development Bank, *Contact Us – Reporting Fraud, Corruption and Ethics Violations*, http://www.caribank.org/about-cdb/contact-us; European Bank for Reconstruction and Development, *Project Complaint Mechanism*, https://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism.html; Inter-American Development Bank, *The Independent Consultation and Investigation Mechanism*, https://www.iadb.org/en/mici; World Bank – IBRD & IDA, *The Inspection Panel*, http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx; Nordic Investment Bank, *Report Misconduct, Corruption and Non-compliance*, https://www.nib.int/contacts/report_misconduct_corruption.

passing the FSIA, Congress had no intention of altering the scope of immunity under the IOIA.

As a principal example, the application of the commercial activities exception to MDBs is far from clear. The commercial activities exception is founded on the distinction between "sovereign acts" and "commercial acts." When a foreign sovereign is acting as a market regulator and, for example, issues regulations concerning foreign currency exchange, it is engaged in sovereign acts and is immune from suit. *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614-15 (1992). On the other hand, when the same foreign sovereign acts as a "private player" within the same market and, for example, issues bonds in furtherance of currency stabilization, it is engaged in commercial acts and is not immune under the FSIA. *Id.* at 615-16.

The distinction between sovereign acts and commercial acts is inapt for the IOIA because MDBs—like all international organizations—cannot undertake sovereign acts. The distinction is also inapt because MDBs do not act as mere private players—as sovereigns often do—in the marketplace. MDBs are mission-bound to pursue economic development and support investments that may not be possible in the private market. For this reason, the loan and investment activities of MDBs are different in nature and purpose than common "commercial" acts undertaken by sovereigns.[9]

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[9] *OSS Nokalva*, the only reported decision to apply a commercial activities exception to an international organization, did not have to grapple with these sorts of issues. In that case, the European Space Agency was involved in a run-of-the-mill contract dispute with a counter-party, one of its software vendors, and the core mission of the organization—promoting space research and technology—was not directly implicated. 617 F.3d at 759.

On the other hand, petitioners, and the plaintiffs that will follow in their wake, view the commercial activities exception as carte blanche for bringing suits against MDBs. Petitioners alleged below that IFC "focused exclusively on the private sector" and thus acted as a private actor in the market. Complaint ¶ 194, *Jam* v. *Int'l Fin. Corp.*, No. 15-cv-612-JDB (D.D.C. Apr. 23, 2015) ("Compl."). In order to comply with the FSIA's requirement that the commercial activity have some nexus to the United States, see 28 U.S.C. § 1605(a)(2), petitioners alleged that "numerous critical decisions relevant to whether to finance the Tata Mundra Project" were made in the United States because IFC has its headquarters in Washington, D.C. Compl. ¶ 197. Petitioners further argued that their legal claims were ultimately "based upon" these commercial activities undertaken in the United States. Reply Brief for Petitioners at 8, *Jam* v. *Int'l Fin. Corp.*, No. 17-1011 (Apr. 18, 2018) (citing *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 395 (2015)).

These same allegations and arguments could be made in connection with every loan that an MDB has ever made so long as the MDB has its headquarters or a central office in the United States. Petitioners thus advance an interpretation of the commercial activities exception that is more akin to a rule of no immunity at all for the core activities of MDBs.[10]

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[10] The Solicitor General fails to appreciate the potential scope of petitioners' theory of commercial activities when it notes that "the . . . commercial-activity exception is not an authorization of just any commercial suit." Brief *Amicus Curiae* of United States at 33, *Jam* v. *Int'l Fin. Corp.*, No. 17-1011 (July 31, 2018). This is of course true. But petitioners believe the exception is an authorization of a commercial suit related to *every commercial activity* undertaken by an MDB such as IFC.

And while the actual scope of the exception would need to be resolved in future litigation, the intervening uncertainty would cast a long shadow over the operations of MDBs.

Moreover, if the FSIA defined the interpretation of the IOIA in United States courts, there would be an unmistakable tension in the IOIA between the immunity of MDBs from suit and their immunity from compelled discovery. Congress unequivocally provided in the IOIA that "[t]he archives of international organizations shall be inviolable." 22 U.S.C. § 288a(c).[11] This specific provision does *not* reference the immunity of foreign states and cannot incorporate the exceptions to immunity in the FSIA. Simply put, even if MDBs were somehow subject to suits arising out of their commercial activities, they would still be immune from discovery pursuant to the plain language of the IOIA. This result further demonstrates not only that Congress enacted a very robust form of immunity for international organizations, but also that allowable litigation under the FSIA is an impossible model for suits under the IOIA.

C. *Crippled Operations.* Facing *ex ante* uncertainty about the interpretation of the IOIA, MDBs will need to account for substantially increased transaction costs related to legal defense and to "price in" litigation risk when making investment decisions. This is so because, on the theory of commercial activities advanced by petitioners in this case, every potential investment represents a liability risk that would be limited only by the creativity of plaintiff's counsel

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[11] Many treaties of international organizations also separately provide that the organization's archives are "inviolable." *See, e.g.*, Articles of Agreement of the International Bank for Reconstruction and Development art. 7, § 5.

who are funded by organizations whose livelihood depends upon such "impact litigation."

There is also no reason to believe that these legal costs and litigation risks would be limited to specious chains of causal inference under the broad jurisprudence of federal and state tort law. Nothing in the FSIA would prevent plaintiffs from bringing suits against MDBs for alleged violations of foreign securities laws, environmental laws, workplace health and safety regulations, among others. MDBs would thus need to invest time and resources in following every legal development in every country where they operate in order to manage legal risks associated with their extensive loan portfolios. Again, these are time and resources that would otherwise be directed towards economic development.

Petitioners and their amici also propose a construction of the IOIA that inevitably would require courts in the United States to review and dictate investment decisions. The ensuing entanglement between U.S. courts and MDBs would severely undermine the structural protections of international organization immunity, which are ultimately meant to shield the internal deliberations of these organizations from interference by member states *and* their local courts.

In this case, for example, petitioners assert that the IFC failed to meet its own *voluntary* social and economic investment guidelines when approving the Tata Mundra project. *E.g.*, Compl. ¶¶ 154, 164, 172. Petitioners also seek equitable relief in the form of a court order requiring IFC to "enforce" the loan agreement and pressure the loan recipient to take certain steps. Compl. ¶ 343.

The Complaint thus invites a United States District Court to review and second guess IFC's investment

decision and internal deliberative process with respect to this project. This, in turn, requires a court to interpret voluntary investment guidelines that were collectively drafted by the member states, pass judgment on the adequacy of the guidelines, and decide whether those guidelines have been sufficiently followed. Allowing a member nation's domestic courts to make these sorts of determinations and exercise this sort of control over an international organization is precisely the type of institutional harm that international organization immunity was meant to guard against. *Mendaro*, 717 F.2d at 615.

CONCLUSION

For all these reasons, this Court should affirm the judgment of the D.C. Circuit.

Respectfully submitted,

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September 17, 2018

No. 17-1011

IN THE

Supreme Court of the United States

BUDHA ISMAIL JAM, et al.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF INTERNATIONAL LAW EXPERTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 5

I. INTERNATIONAL ORGANIZATIONS ARE VERY DIFFERENT FROM FOREIGN STATES AND THEREFORE REQUIRE DIFFERENT IMMUNITIES 5

A. International Organizations Cannot Be Analogized to Foreign States 5

B. The Reasons for International Organizational and Foreign Sovereign Immunity Are Fundamentally Different 7

C. The IOIA Gives the President Flexibility to Ensure International Organizations' Functional Immunity 10

II. THE FSIA IS INCOMPATIBLE WITH THE IOIA 13

A. The IOIA and FSIA Have Opposing Structures 13

B. Inserting the FSIA's Immunity Provisions into the IOIA Would Also Create Impossible Interpretive Problems 17

III. PETITIONERS' ARGUMENT IS BASED ON THE FALSE PREMISE THAT THE IOIA CREATES A FIXED RULE OF ABSOLUTE IMMUNITY FOR INTERNATIONAL ORGANIZATIONS 21

A. Petitioners and Supporting *Amici* Fundamentally Misunderstand the IOIA 21

B. The Executive Regularly Acts to Limit International Organizational Privileges and Immunities 22

C. The President Could Create a Commercial Activity Exception Applicable to International Organizations If He Considered It Appropriate 24

IV. THE U.S. POLICY CHANGE TO RESTRICTIVE IMMUNITY FOR FOREIGN SOVEREIGNS RESPONDED TO CHANGES IN INTERNATIONAL LAW THAT HAVE NEVER OCCURRED FOR INTERNATIONAL ORGANIZATIONS 26

A. The Tate Letter Signaled a Change in Foreign Sovereign Immunity Only, Not International Organizational Immunity 26

B. The United States Did Not Change Its Views with Respect to International Organizational Immunity in the Wake of the Tate Letter 28

C. The International Law of International Organizational Immunity Is Fundamentally Different from the Law of Sovereign Immunity 32

V. ADOPTING PETITIONERS' CONSTRUCTION OF THE IOIA WOULD DRAMATICALLY CHANGE U.S. POLICY 34

CONCLUSION 38

APPENDIX: LIST OF *AMICI CURIAE* A-1

TABLE OF AUTHORITIES

CASES

Atkinson v. Inter-Am. Dev. Bank, 156 F.3d 1335 (D.C. Cir. 1998) 31

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 19

Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926) 37

Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017) 32

Jam v. Int'l Finance Corp., 860 F.3d 703 (D.C. Cir. 2017) 1

Jesner v. Arab Bank, 138 S. Ct. 1386 (2018) 37

Kiobel v. Royal Dutch Petro. Co., 569 U.S. 108 (2013) 37

Lutcher S.A. Celulose E Papel v. Inter-Am. Dev. Bank, 382 F.2d 454 (D.C. Cir. 1967) 29

Medellin v. Texas, 552 U.S. 491 (2008) 19, 20

Mendaro v. World Bank, 717 F.2d 610 (D.C. Cir. 1983) 35

Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 34

OSS Nokalva, Inc. v. Eur. Space Agency, 617 F.3d 756 (3d Cir. 2010) 32

Republic of Arg. v. Weltover, Inc., 504 U.S. 607 (1992) 16

Samantar v. Yousuf, 560 U.S. 305 (2010) 7, 12

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 37

The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812) 37

United States v. Melekh, 190 F. Supp. 67 (S.D.N.Y. 1960) 29

Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983) 7

Wencak v. United Nations, 135 N.Y.L.J. 13 (Sup. Ct. NY. Jan. 19, 1956), *also available at* 23 Int'l L. Rep. 509 ..... 28, 29

FEDERAL STATUTORY AUTHORITIES

22 U.S.C. § 288 ..... passim

22 U.S.C. §§ 288 et seq. ..... passim

22 U.S.C. § 288a(b) 12, 18

22 U.S.C. § 288c 25

28 U.S.C. §§ 1602 *et seq.* ..... passim

28 U.S.C. § 1602 12

28 U.S.C. § 1604 12

28 U.S.C. § 1605 15

28 U.S.C. § 1605(a)(1) 18

28 U.S.C. § 1605(a)(2) 17

28 U.S.C. § 1605A 15

International Organizations Immunities Act, Pub. L. No. 79-291, 59 Stat. 669 (1945) ... 11, 15, 16

EXECUTIVE MATERIALS

Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962) 23

Exec. Order No. 11,227, 30 Fed. Reg. 7369 (June 2, 1965) 23

Exec. Order No. 11,277, 31 Fed. Reg. 6609 (Apr. 30, 1966) 23

Exec. Order No. 11,283, 31 Fed. Reg. 7667 (May 27, 1966) 23

Exec. Order No. 11,318, 31 Fed. Reg. 15,307 (Dec. 5, 1966) 23, 24

Exec. Order No. 11,718, 38 Fed. Reg. 12,797 (May 14, 1973) 23

Exec. Order No. 11,760, 39 Fed. Reg. 2343 (Jan. 17, 1974) 23, 24

Exec. Order No. 12,359, 47 Fed. Reg. 17,791 (Apr. 22, 1982) 23

Exec. Order No. 12,425, 48 Fed. Reg. 28,069 (June 16, 1983) 23, 24

Exec. Order No. 12,467, 49 Fed. Reg. 8229 (Mar. 2, 1984) 23

Exec. Order No. 12,732, 55 Fed. Reg. 46,489 (Oct. 31, 1990) 20

Exec. Order No. 12,986, 61 Fed. Reg. 1693 (Jan. 18, 1996) 23

Exec. Order No. 13,042, 62 Fed. Reg. 18,017 (Apr. 14, 1997) 23, 25

Exec. Order No. 13,367, 69 Fed. Reg. 77,605 (Dec. 21, 2004) 23

Exec. Order No. 13,451, 72 Fed. Reg. 224 (Nov. 21, 2007) 20

Exec. Order No. 13,524, 74 Fed. Reg. 67,803 (Dec. 16, 2009) 23, 24

LEGISLATIVE MATERIALS

91 Cong. Rec. 12,530 (Dec. 21, 1945) 25

H.R. Rep. No. 79-1203 (1945) ..... passim

H.R. Rep. No. 94-1487 (1976) 14

S. Res. 2715, 101st Cong. (1990) 31

S. Exec. Rep. 91-17 (1970) 30

S. Rep. No. 79-861 (1945) ..... passim

S. Rep. No. 94-1310 (1976) 14

OTHER AUTHORITIES

Agreement establishing the International Fund for Agricultural Development, done at Rome, June 13, 1976, entered into force Nov. 30, 1977, 28 U.S.T. 8435 20

Agreement on the establishment of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER project, signed at Paris, Nov. 21, 2006, entered into force Oct. 24, 2007, T.I.A.S. 07-1024 20

Peter H. F. Bekker, *The Legal Position of Intergovernmental Organizations – A Functional Necessity Analysis of Their Legal Status and Immunities* (1994) ..... passim

Brief for the United Nations as *Amicus Curiae, Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465) 5, 6, 8, 35

Brief of the United States as *Amicus Curiae* in Support of Affirmance, *EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2d. Cir. 2007) (Nos. 06-0403-cv, 06-0405-cv, 06-0406cv) 31

Brief for United States as Intervenor, *Veiga v. World Meteorological Org.*, 368 Fed. Appx. 189 (2d Cir. 2010) (No. 08-3999-cv) 31

Charles H. Brower, II, *International Immunites: Some Dissident Views on the Role of Municipal Courts*, 41 Va. J. Int'l L. 1 (2001) 18, 33

Convention on the Privileges and Immunities of the United Nations, done at New York, Feb. 13, 1946, entered into force Sept. 17, 1946, entered into force for the United States Apr. 29, 1970, 21 U.S.T. 1418 ..... 19, 29

Diplomatic Privileges (Extension) Act 1944, Geo. 6 c. 44 (Eng.), *reprinted in* 39 Am. J. Int'l L. Sup. 163-67 (1945) 12

Alice Ehrenfeld, *United Nations Immunity Distinguished from Sovereign Immunity*, 52 Am. Soc'y Int'l L. Proc. 88 (1958) 35

Leonardo D. Gonzalez (Special Rapporteur) "Fourth Report on Relations Between States and International Organizations," U.N. Doc. A/CN.4/424, *reprinted in* 1989 Y.B. Int'l L. Comm'n 153, U.N. Doc. A/CN.4SER.A/1989/Add.1 33

Indian Ministry of External Affairs Notification No. D-II/451/12(21)/2009, Gazette of India, pt. II sec. 3(ii) (July 13, 2016) 36

C. W. Jenks, *International Immunities* (1961) 8

Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Phillip B. Perlman, Acting Attorney Gen. (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984 (1952) 27, 28, 29, 32

Edward C. Okeke, *Jurisdictional Immunities of States and International Organizations* (2018) 6, 33

Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (April 11) 6

Reply in Support of Statement of Interest of the United States of America, *Lempert v. Rice*, 956 F. Supp. 2d 17 (D.D.C. 2013) (No. 12-01518) 31

Restatement (Third) of the Foreign Relations Law of the United States (1987) 8, 32, 33

INTEREST OF *AMICI CURIAE*[1]

Amici curiae, legal experts in international law, the law of international organizations ("IOs"), and the law of foreign sovereign immunity, believe that the United States Court of Appeals for the District of Columbia Circuit correctly decided *Jam v. International Finance Corp.*, 860 F.3d 703 (D.C. Cir. 2017), and that the International Organizations Immunities Act ("IOIA"), 22 U.S.C. §§ 288 *et seq.*, does not incorporate the immunity provisions of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602 *et seq.* *Amici* believe that this Court should affirm that decision.

Amici have a professional interest in clarifying the law of IO immunities, the relationship between sovereign states and IOs, and the reasons why immunity for IOs is different from immunity for sovereign states.

The appendix includes a full list of *amici*.

SUMMARY OF THE ARGUMENT

Petitioners' attempt to assimilate the immunities from suit and judicial process of IOs with those of foreign states ignores the fundamental differences

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[1] All parties have consented to the filing of this brief. Supreme Court Rule 37.3(a). Petitioners and Respondent provided blanket consent for all *amicus* briefs on June 27 and July 2, 2018, respectively. No counsel for a party authored any part of this brief, and no person other than *amici* and their counsel contributed financially to the preparation or submission of this brief. *Id.*, Rule 37.6.

between IOs and foreign states. States have sovereign authority, with all the rights and obligations attendant thereto. IOs, in contrast, are creatures of treaty established by their member states for the limited purposes stated in their constituent instruments.

Because they are so different, the reasons for according IOs and foreign states immunity are also different. Foreign sovereign immunity is a matter of grace and comity, and typically extended on the basis of reciprocity. IO immunity, in contrast, is grounded in the need for IOs to be free to carry out the functions for which they were created without interference by member states.

Congress designed the IOIA to ensure IOs' functional immunity. The IOIA expressly gives the President broad power to withhold or withdraw IOs' immunities "in light of the functions performed by any such international organization." 22 U.S.C. § 288.

Petitioners' effort to read the IOIA to incorporate the immunity provisions of the FSIA faces insurmountable barriers. The two acts are structurally incompatible. The IOIA gives the President exclusive authority to determine the extent of IOs' immunity from suit and judicial process. In contrast, the FSIA takes foreign sovereign immunity decisions away from the Executive and gives exclusive power to the Judiciary. Reading the two together would create an unworkable hybrid inconsistent with Congress's delegation of plenary power to the President in the IOIA.

Incorporating the FSIA's immunity provisions into the IOIA would also create grave interpretive problems. The restrictive theory of sovereign immunity turns on the distinction between foreign states' sovereign acts (*acta jure imperii*) and their private acts (*acta jure gestionis*). That distinction is meaningless when applied to IOs. International organizations do not undertake sovereign acts. Rather, they undertake acts in the exercise of their function, many of which have some of the attributes of private acts. Even so, they are not genuinely private acts; they are acts in fulfillment of the mission their member states assign to them.

Petitioners present this Court with a false, binary choice: IOs get absolute immunity or they get FSIA-based immunity. To the extent the IOIA creates a rule of absolute or virtually absolute immunity, it does so only as the default rule. The President may depart from this default rule and withhold or withdraw IOs' immunity in light of the functions they perform. Seven Presidents have exercised this IOIA authority. There is therefore no risk of IOs somehow being uniquely above the law, as Petitioners contend.

The FSIA conforms to generally accepted international standards; the restrictive theory of foreign sovereign immunity is consistent with prevailing international law. In contrast, international law does not recognize the application of the restrictive theory to IOs. General international law accords IOs such privileges and immunities as are necessary to fulfill their purposes. Equating IO immunity to foreign sovereign immunity would put U.S. law at odds with accepted international

standards. It would also put the U.S. in breach of treaty obligations that provide IOs with broader immunities than does the FSIA.

Petitioners' construction, if accepted, would materially change U.S. policy. For over 70 years, IOs have enjoyed immunity from suit and judicial process in U.S. courts. A ruling in favor of Petitioners would not only change this long-standing reality, it would, if followed elsewhere, open the door to unwelcome state interference in the functioning of IOs.

Taking IO immunity decisions away from the President and placing them in the hands of U.S. courts would also lead to a surge in litigation that, like this case, has only a tenuous connection to this country. This is even more true because many IOs are headquartered in the United States. These potential changes raise serious foreign policy concerns that compel caution.

The Court has shown restraint in circumstances raising significantly less sensitive foreign policy concerns than those implicated here. In such circumstances, the Court has deferred to the political branches, which are better placed to balance competing considerations. The Court should do the same now. Whether such wholesale changes to IO immunity law are warranted is a policy decision for Congress and the Executive to make together.

ARGUMENT

I. INTERNATIONAL ORGANIZATIONS ARE VERY DIFFERENT FROM FOREIGN STATES AND THEREFORE REQUIRE DIFFERENT IMMUNITIES

A. International Organizations Cannot Be Analogized to Foreign States

Petitioners' efforts to assimilate IOs' immunity from suit and judicial process to the immunity enjoyed by foreign states proceeds from a false premise. In their view, no material distinction exists between IOs and foreign states: "International organizations are compilations of sovereigns, so the rules governing the latter's amenability to suit ought to govern the former's." Brief for Petitioners at 15. Petitioners are mistaken.

International organizations and foreign states are fundamentally different creatures. Although both have legal personality under international law, states are sovereigns in equality with other states; IOs are not. States have territory and wield exclusive sovereign authority; IOs do not. And states have citizens, economies, and militaries; IOs do not. *See* Brief for the United Nations as *Amicus Curiae* ("U.N. *Broadbent Amicus* Br.") at 12-13, *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465).

Unlike foreign states, IOs are creatures of treaties entered into by their member states. They have separate legal personality from their members, and

their purposes, functions, and structure are defined in—and limited by—their constituent instruments. Moreover, no two IOs are the same. Each has its own particular mandate and power appropriate to fulfill its specific purposes and functions. *Id.* at 9-10; *see also* Edward C. Okeke, *Jurisdictional Immunities of States and International Organizations* 234-35 (2018). Moreover, those functions sometimes lie beyond the capacity of any single state or group of states.

When deciding just its third case, the International Court of Justice opined that the United Nations was an "international person," thereby recognizing IOs as subjects of international law alongside sovereign states. *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J., 174, 179 (Apr. 11). It explained, however, that

> [t]hat is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. . . . Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.

Id.

Given the profound differences between IOs and foreign states, Petitioners' attempt to conflate the

privileges and immunities that these different subjects of international law enjoy is inherently flawed. Indeed, "[i]t must be stressed that the law of organizational immunities, concerning immunities granted to international organizations as such, is a separate body of law, quite distinct from the law of sovereign and diplomatic immunity by reason of the special nature of international organizations." Peter H.F. Bekker, *The Legal Position of Intergovernmental Organizations—A Functional Necessity Analysis of Their Legal Status and Immunities* 149 (1994).

B. The Reasons for International Organizational and Foreign Sovereign Immunity Are Fundamentally Different

Because IOs and sovereign states are so different, the reasons for granting them immunity are also very different.

Traditionally, foreign sovereign immunity has been recognized as an attribute of sovereignty and extended for reasons of reciprocity. "The doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976." *Samantar v. Yousuf*, 560 U.S. 305, 311 (2010). That recognition of immunity at common law was extended to foreign sovereigns as "a matter of grace and comity." *Id.* (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)).

Unlike IOs, foreign states are able to protect themselves from undue interference from other states. They can, for example, condition sovereign

immunity on reciprocity or protect themselves through other retaliatory measures. U.N. *Broadbent Amicus* Br. at 12-13.

The reasons for granting IOs immunity are different and essentially functional. For IOs to fulfill the purposes for which member states created them, states have recognized the need to accord IOs such privileges and immunities as are necessary to achieve those purposes. International law therefore accords IOs "such privileges and immunities from the jurisdiction of a member state as are necessary for the fulfillment of the purpose of the organization, including immunity from legal process, and from financial controls, taxes, and duties." *Restatement (Third) of the Foreign Relations Law of the United States* § 467(1) (1987).

IOs' need for functional immunity is tied to their need for independence from their member states. IOs' constituent treaties typically define each member's influence within the organization, and how that influence is to be exerted—usually through collective organs. If individual members could exert additional influence by, for example, subjecting IOs to suits that target their activities, their independence and the ability to achieve their purposes could be compromised. As one scholar long-ago observed, "jurisdictional immunity is a necessary bulwark of the independence of international organisations and an essential safeguard for their opportunities of further growth." Jenks, C.W., *International Immunities* 41 (1961); *see also* Bekker, *supra*, at 99-103.

Congress was aware of these concerns when it

enacted the IOIA. The legislative history shows that Congress wanted to protect the independence and facilitate the work of IOs operating in the United States. The Senate report states: "[P]assage of this bill at this time would be an important indication of the desire of the United States to *facilitate fully the functioning* of international organizations in this country." S. Rep. No. 79-861, at 2-3 (1945) (emphasis added).

Amici Curiae Professors of International Organization and International Law in Support of Petitioners ("Petitioners' *Amici* Professors") themselves point to the United States' desire to secure IOs' functional immunity around the time of the IOIA's enactment:

> In 1944 and 1945, with the end of World War II in view, U.S. diplomats and lawyers were laying the foundational architecture for a new generation of IOs and new approaches to their privileges and immunities. In negotiating the articles of agreement for the International Monetary Fund and the International Bank for Reconstruction and Development (World Bank) in 1944 at the Bretton Woods conference, the United States took distinctly different approaches to the privileges and immunities of these two new bodies, *tailoring them to the bodies' different functions*. . . . The UN Charter negotiated in San Francisco in June 1945 indicated that the Organization would "enjoy in the territory of each of its Members *such privileges and immunities as are necessary for the fulfillment of its*

purposes."

Brief of Petitioners' *Amici* Professors at 10-11 (emphasis added) (footnotes omitted).[2]

Petitioners are therefore wrong to claim that "a foreign state should be treated the same in U.S. courts whether it acts on its own or through an organization it helped to create." Brief for Petitioners at 32. When a state acts on its own, it does so as a sovereign with all the rights and prerogatives sovereigns enjoy. But when a state joins an IO, it does so as one among many members and then only to advance the mission of the IO it is joining. Moreover, as a separate legal person under international law, the IO itself acts in accordance with its functions and founding charter. The member states are not the actors. There is therefore every reason to continue treating foreign states and IOs differently in U.S. courts.

C. The IOIA Gives the President Flexibility to Ensure International Organizations' Functional Immunity

The text and scheme of the IOIA reflect Congress's desire to ensure IOs' functional immunity. The text could scarcely be clearer:

> The President shall be authorized, *in light of the functions performed by any such*

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[2] The Table of Authorities included in the Brief of Petitioners' *Amici* Professors lists no writings regarding IO immunities or the IOIA by any of the *Amici* Professors and omits references to important standard works on IO immunities of recent date.

> *international organization*, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this title (including the amendments made by this title) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity.

IOIA, Pub. L. No. 79-291, § 1, 59 Stat. 669, 669-73 (1945) (emphasis added); *see* 22 U.S.C. § 288.[3]

When it granted the President the authority to withhold and withdraw privileges and immunities from IOs, Congress thus contemplated that the President's actions would be guided by "the functions performed by any such international organization." In other words, Congress granted the President the authority to withhold or withdraw the privileges and immunities of any particular IO if he or she deems them unnecessary to facilitating the functions of that IO. *See infra* § III.B.

The question then becomes: what is the scope of the default "privileges, exemptions, and immunities provided for in" the IOIA that the President is empowered to withhold or withdraw? As regards the immunity from suit and judicial process, Section 2(b) of the IOIA provides the answer: IOs "shall enjoy the same immunity from suit and every form of judicial

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[3] Twenty-two U.S.C. § 288 uses the phrase "this subchapter" instead of "this title."

process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b).

Petitioners take the view that under the so-called "reference canon," this language imports the FSIA's immunity rules governing foreign states. Brief for Petitioners at 15-17, 26-37. Respondent ably rebuts Petitioners' core contention. Brief for Respondent at 25-30. *Amici* will not repeat those arguments. *Amici* add only that in their view, the language of Section 2(b) was intended to capture the then-prevailing default rule of foreign sovereign immunity, *i.e.*, virtually absolute immunity. *Samantar,* 560 U.S. at 311. Congress was simply stating that IOs, like foreign states, enjoy immunity from suit, except to the extent the President may decide otherwise pursuant to his authority to withhold or withdraw that immunity.

The legislative history supports this reading. Congress expressly noted the growing contemporaneous precedent of foreign states providing IOs with absolute immunity, including examples from Switzerland, the United Kingdom, Canada, and The Netherlands. S. Rep. No. 79-861, at 3; H. Rep. No. 79-1203, at 3. The British legislation, which the House and Senate Reports describe as "substantially similar in conception and content" to the IOIA, *id.*, grants IOs absolute immunity from suit and legal process. Diplomatic Privileges (Extension) Act 1944, 7 & 8 Geo. 6 c. 44 (Eng.), *reprinted in* 39 Am. J. Int'l L. Sup 163-67 (1945). Relying on these examples, Congress concluded that the IOIA immunities "are standard in the light of available precedents." S. Rep. No. 79-861, at 3; H. Rep. No. 79-

1203, at 3.

Moreover, as Respondent explains, the IOIA's drafting history shows that Congress treated the phrase "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments" as substantially equivalent to the phrase "immunity from suit and every form of judicial process." Brief for Respondent at 36.

II. THE FSIA IS INCOMPATIBLE WITH THE IOIA

A. The IOIA and FSIA Have Opposing Structures

Petitioners see no structural or interpretive impediments to incorporating the immunity provisions of the FSIA into the IOIA. Indeed, they claim that the IOIA's structure "reinforces" their argument that the IOIA incorporates the FSIA. Brief for Petitioners at 26-31. Petitioners' *Amici* Professors likewise assert that incorporating the FSIA into the IOIA "produces a coherent, workable approach to IO immunity." Brief of Petitioners' *Amici* Professors at 19-20. Petitioners and Petitioners' *Amici* Professors could not be more wrong.

The FSIA and IOIA are incompatible. The IOIA gives the President plenary authority to designate "through appropriate Executive order" IOs that are entitled to enjoy the IOIA's "privileges, exemptions, and immunities." 22 U.S.C. § 288. It also gives the President broad power, "in the light of the functions performed by any such international organization . . . to withhold or withdraw from any such organization or its officers or employees any of the

privileges, exemptions, and immunities provided for in this [title]." *Id.* The legislative history makes clear that Congress drafted the IOIA this way to give the President "broad powers" that would "permit prompt action" in withholding or withdrawing immunities for IOs. S. Rep. No. 79-861, at 4; H. Rep. No. 79-1203, at 6. The IOIA is thus structured to give the President the ultimate authority to decide whether and to what extent IOs receive immunity.

The IOIA's deference to Presidential authority is broadly consistent with the governing approach to foreign sovereign immunity decisions in 1945. At that time and for 31 years thereafter, sovereign immunity decisions rested with the Executive. Petitioners and Petitioners' *Amici* Professors admit the point. *See* Brief for Petitioners at 40; Brief of Petitioners' *Amici* Professors at 19-20.

The FSIA adopts an entirely different approach. It was enacted precisely to remove sovereign immunity decisions from the Executive. A "principal purpose" of the law was to "transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." H.R. Rep. No. 94-1487, at 7 (1976); S. Rep. No. 94-1310, at 9 (1976).

This is reflected in the first section of the FSIA, captioned "Findings and declaration of purpose," which provides in part: "The Congress finds that *the determination by United States courts of the claims*

of foreign states to immunity from the jurisdiction of courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. § 1602 (emphasis added).

The IOIA is structured to give the President plenary power to determine IOs' immunity. The FSIA, in contrast, strips the Executive of its former power and turns the issue over exclusively to the Judiciary. Reading the two together would create an impracticable hybrid whereby issues of IO immunity would be subject first to Presidential determination and then, secondarily, to judicial review. This awkward, two-branch review is incompatible with Congress's determination to give the President "broad powers" to make IO immunity decisions.

It would also lead to absurd results. As stated, the IOIA gives the President the power "to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this title." IOIA § 1, 59 Stat. at 669; *see* 22 U.S.C. § 288. But the FSIA also lifts foreign states' immunity from suit in those areas covered by the exceptions in Sections 1605 and 1605A. That being the case, if the FSIA were deemed incorporated into the IOIA, it is hard to see what meaningful areas of immunity would be left for the President to withhold or withdraw.

This is particularly true given that the realms in which the FSIA was designed to *preserve* foreign states' immunity relate to their *acta jure imperii*, or sovereign acts (versus their *acta jure gestionis*, or

private/commercial acts). *See, e.g., Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 612-14 (1992). Yet, because they are not sovereign, IOs by definition do not engage in sovereign acts. *See* Bekker, *supra*, at 156-58. Reading the FSIA into the IOIA would therefore leave IOs with few if any meaningful immunities. The President therefore would be effectively stripped of the authority to withhold or withdraw IOs' immunity that the IOIA explicitly gives him.

Another problem exists because the IOIA is a one-way street: it only allows the President to narrow the immunities of designated IOs, not expand them. *See* 22 U.S.C. § 288. If the FSIA's immunity provisions were incorporated into the IOIA, the President would be without authority to accord IOs broader immunities than the FSIA allows. This would severely constrain the President's power to determine the extent of an IO's immunity "in the light of the functions performed by any such international organization." *Id.* What if, for example, the President determined that an IO's functions required that it be excepted from the FSIA's immunity exceptions? On Petitioners' case, the President would be impotent. This cannot be the result Congress intended.

Further still, the plain text of the IOIA indicates that Congress did not contemplate that any amendments thereto would come from outside the statute. The IOIA states that the President may withhold or withdraw any of "the privileges, exemptions, and immunities provided for in this title (including the *amendments made by this title*)." § 1, 59 Stat. at 669 (emphasis added); *see* 22 U.S.C. § 288.

By its terms, Congress thus contemplated that any amendments to the IOIA would be made to the statute itself, not imported from without by implication.

The legislative history confirms this interpretation. Congress intended to set "forth *in one place* all of the specific privileges which international organizations will enjoy." S. Rep. No. 79-861, at 3 (emphasis added); H. Rep. No. 79-1203, at 6 (emphasis added). Reading the FSIA into the IOIA would mean that the privileges IOs enjoy would be found in two different places.

B. Inserting the FSIA's Immunity Provisions into the IOIA Would Also Create Impossible Interpretive Problems

Incorporating the FSIA's immunity provisions into the IOIA would create other interpretive problems. Petitioners' central argument is that the FSIA's commercial activity exception, 28 U.S.C. § 1605(a)(2), should apply also to IOs. Brief for Petitioners at 2.

As stated, the FSIA's commercial activity exception is premised on the distinction between states' sovereign acts and their private acts. But this distinction is meaningless in the case of IOs. International organizations do not undertake sovereign acts in the true meaning of that phrase. Instead, they undertake acts in the exercise of their functions. Some of those acts may have attributes of private acts—loans to development projects, for example—but they are not genuinely private or commercial acts. Rather, they are acts in fulfillment

of the mission assigned to them by their member states, many of which private citizens operating in the free market could not do.

Because the case law interpreting the scope of the FSIA's commercial activity exception developed against the backdrop of the *acta jure imperii*/*acta jure gestionis* distinction, and because that distinction does not apply to IOs, the existing jurisprudence is a poor fit for assessing the activities of IOs. *See* Charles H. Brower, II, *International Immunities: Some Dissident Views on the Role of Municipal Courts*, 41 Va. J. Int'l L. 1, 7, 16 (2001) ("Leading writers have rejected the wholesale application of sovereign immunity concepts to international organizations, which do not possess the traditional attributes of states."); *see also* Bekker, *supra*, at 156. An unthinking application of that jurisprudence could jeopardize the functions and independence of IOs, precisely those things the IOIA was designed to protect.

Additionally, under the IOIA, IOs may only waive immunity "expressly." 22 U.S.C. § 288a(b). Yet the FSIA allows foreign states to waive their immunity "either explicitly or by implication." 28 U.S.C. § 1605(a)(1). If the IOIA were read to incorporate the FSIA's immunity rules, the two provisions would be in open conflict. Nothing in Petitioners' brief suggests any way to reconcile the two.

In addition, merging the two statutes would put the United States in violation of its obligations under both conventional and customary international law. The treaties that create IOs often contain immunity

provisions, as do other treaties dealing exclusively with IO immunity. *See, e.g.*, Convention on the Privileges and Immunities of the United Nations ("Convention on Privileges and Immunities"), done at New York, Feb. 13, 1946, entered into force Sept. 17, 1946, entered into force for the United States Apr. 29, 1970, 21 U.S.T. 1418. Petitioners' *Amici* Professors see no potential for conflict. They claim: "The application of the immunity principles codified in the FSIA to IOs would preserve and prioritize those U.S. obligations under international agreements that grant higher (or lower) levels of immunity than specified in the FSIA to certain IOs." Brief of Petitioners' *Amici* Professors at 27.

Petitioners' *Amici* Professors rely on Section 1604 of the FSIA, which provides that the FSIA's immunity provisions are only "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act [i.e., October 21, 1976]." 28 U.S.C. § 1604. Even if this provision does eliminate the potential for conflict with treaties to which the United States was a party before October 1976,[4] it does not alleviate the potential for conflict with later agreements or U.S. obligations under

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[4] Because the FSIA's immunity provisions can only be overcome by an international agreement that "expressly conflicts" with the FSIA, *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989), non-self-executing agreements that predate the FSIA, provide for IO immunities, and to which the United States is a party also may not supersede the FSIA. *See Medellin v. Texas*, 552 U.S. 491, 505 ("When . . . treaty stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect." (quotation marks and brackets omitted)).

customary international law. If the IOIA were to incorporate the FSIA's immunity provisions, the IOIA would violate any non-self-executing treaties entered into by the United States after October 1976 that provide different immunities for IOs than does the FSIA and are not accompanied by implementing legislation.[5] *See, e.g.*, *Medellin v. Texas*, 552 U.S. 491, 504-05 (2008).

When adopting the IOIA, Congress was aware that many of the treaties that created IOs would include provisions regarding privileges and immunities. *See* S. Rep. No. 79-861, at 2; H. Rep. No. 79-1203, at 2 ("Provisions have been made with respect to the problem of privileges and immunities in the international conferences in connection with the creation of UNRRA, the International Monetary Fund and International Bank, the Food and Agriculture Organization of the United Nations, and others."). For that reason, no provisions of the IOIA conflict with

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[5] *Compare* Exec. Order No. 13,451, 72 Fed. Reg. 224 (Nov. 21, 2007) (designating the International Fusion Energy Organization as an IO), *and* Exec. Order No. 12,732, 55 Fed. Reg. 46,489 (Oct. 31, 1990) (designating the International Fund for Agricultural Development as an IO), *with* Agreement on the establishment of the ITER International Fusion Energy Organization for the Joint Implementation of the ITER project art. 12, signed at Paris, Nov. 21, 2006, entered into force Oct. 24, 2007, T.I.A.S. 07-1024 (providing for different immunity protections for the International Fusion Energy Organization than those that the FSIA provides), *and* Agreement establishing the International Fund for Agricultural Development art. 10 § 2, done at Rome, June 13, 1976, entered into force Nov. 30, 1977, 28 U.S.T. 8435 (providing stronger immunities for the International Fund for Agricultural Development than the FSIA provides).

U.S. treaty obligations, past or present. Reading the FSIA into the IOIA would destroy that legislative elegance.

III. PETITIONERS' ARGUMENT IS BASED ON THE FALSE PREMISE THAT THE IOIA CREATES A FIXED RULE OF ABSOLUTE IMMUNITY FOR INTERNATIONAL ORGANIZATIONS

A. Petitioners and Supporting *Amici* Fundamentally Misunderstand the IOIA

Petitioners and their *Amici* make another basic mistake in their understanding of the IOIA. They argue that the Court's choice is binary: either IOs get absolute immunity or they get FSIA-based immunity. The choice is false.

Petitioners argue, for example, "[t]he D.C. Circuit is incorrect that the IOIA gives international organizations absolute immunity from suit. Rather, by its plain terms, the IOIA tracks the rules established in the FSIA." Brief for Petitioners at 14. Presenting the issue this way may make Petitioners' argument seem more appealing, but it belies a profound misunderstanding of the IOIA and immunities enjoyed by IOs under international law.

The IOIA does not "fr[ee]ze a rule of absolute immunity for IOs as of 1945," as Petitioners' *Amici* Professors suggest. *Id.* at 15; *see also id.* at 15, 20 (Respondent's construction would "enshrin[e] a fixed rule for all time"); Brief for Petitioners at 8, 21. To the contrary, the IOIA recognizes that IOs, as creatures of multilateral treaties created for specific purposes,

may require different levels of immunity depending on their functions. Thus, the IOIA authorizes the President to decide (1) which IOs are entitled to receive privileges and immunities and (2) the extent of those privileges and immunities in light of the IOs' functions. 22 U.S.C. § 288. The extent of IO immunity is thus entirely within the President's control.

Put simply, to the extent the IOIA sets a rule of "absolute" immunity, it does so only as the default rule. But the IOIA also gives the President plenary authority to depart from this default rule and narrow IOs' immunity at any time he considers it appropriate. There is therefore no question of IOs having a "right to be uniquely above the law," as Petitioners melodramatically put it. Brief for Petitioners at 33. To the contrary, the IOIA puts IOs squarely within the law's reach. All that is required is Executive action.

B. The Executive Regularly Acts to Limit International Organizational Privileges and Immunities

The President has regularly exercised his IOIA authority to limit IOs' privileges and immunities, in light of the particular functions of that IO or group of IOs.

Since the adoption of the IOIA, seven different Presidents (Kennedy, Johnson, Nixon, Reagan, Clinton, G.W. Bush, and Obama) have, on at least 16 occasions, exercised their IOIA authority to limit or

amend limitations on the immunities of IOs.[6] In eight out of 14 of those Executive Orders, the President withheld full or partial immunity from suit and judicial process for the IO, or part of the IO, in question.[7] On two occasions, the President conferred

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[6] Exec. Order No. 13,524, 74 Fed. Reg. 67,803 (Dec. 16, 2009) (Interpol); Exec. Order No. 13,367, 69 Fed. Reg. 77,605 (Dec. 21, 2004) (U.S.-Mexico Border Health Comm'n); Exec. Order No. 13,042, 62 Fed. Reg. 18,017 (Apr. 14, 1997) (World Trade Org.); Exec. Order No. 12,986, 61 Fed. Reg. 1693 (Jan. 18, 1996) (Int'l Union for Conservation of Nature and Natural Res.); Exec. Order No. 12,467, 49 Fed. Reg. 8229 (Mar. 2, 1984) (Int'l Boundary and Water Comm'n); Exec. Order No. 12,425, 48 Fed. Reg. 28,069 (June 16, 1983) (Interpol, superseded by later Executive Order No. 13,524); Exec. Order No. 12,359, 47 Fed. Reg. 17,791 (Apr. 22, 1982) (Int'l Food Policy Research Inst.); Exec. Order No. 11,760, 39 Fed. Reg. 2343 (Jan. 17, 1974) (European Space Research Org.); Exec. Order No. 11,718, 38 Fed. Reg. 12,797 (May 14, 1973) (INTELSAT); Exec. Order No. 11,283, 31 Fed. Reg. 7667 (May 27, 1966) (Int'l Cotton Inst.); Exec. Order No. 11,277, 31 Fed. Reg. 6609 (Apr. 30, 1966) (Int'l Telecommunications Satellites Consortium); Exec. Order No. 11,318, 31 Fed. Reg. 15,307 (Dec. 5, 1966) (European Space Research Org., superseded by later Exec. Order No. 11,760); Exec. Order No. 11,227, 30 Fed. Reg. 7369 (June 2, 1965) (Interim Communications Satellite Comm.); Exec. Order No. 11,059, 27 Fed. Reg. 10,405 (Oct. 23, 1962) (Int'l Pacific Halibut Comm'n, Great Lakes Fisheries Comm'n, Inter-American Tropical Tuna Comm'n).

[7] Exec. Order No. 13,367 (U.S.-Mexico Border Health Comm'n); Exec. Order No. 12,986 (Int'l Union for Conservation of Nature and Natural Res.); Exec. Order No. 12,467 (Int'l Boundary and Water Comm'n); Exec. Order No. 12,359 (Int'l Food Policy Research Inst.); Exec. Order No. 11,718 (INTELSAT); Exec. Order No. 11,283 (Int'l Cotton Inst.); Exec. Order No. 11,277 (Int'l Telecommunications Satellites Consortium); Exec. Order No. 11,227 (Interim Communications Satellite Comm.).

immunities that had been limited by a previous President.[8]

This practice demonstrates the efficacy, flexibility, and wisdom of the IOIA's system of providing for and enforcing functional immunity for IOs. The fact that Presidents routinely exercise their authority under the IOIA further reinforces the conclusion that Congress set a default rule of "immunity from suit and every form of judicial process" but allowed the President to limit that immunity if the functions of the IO so demand.

C. The President Could Create a Commercial Activity Exception Applicable to International Organizations If He Considered It Appropriate

Rather than trying to shoe-horn immunities derived from the FSIA into the IOIA, a far simpler means is available to limit an IOs' immunity when it engages in commercial activities outside the scope of its functions. The President could simply issue an Executive Order so providing.

Indeed, Congress contemplated just this possibility. According to the Senate report, Congress explicitly recognized that "[t]his provision [*i.e.*, Section 1 of the IOIA] will permit the adjustment or

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[8] Exec. Order No. 13,524 (Interpol); Exec. Order No. 12,425 (Interpol, superseded by later Executive Order No. 13,524); Exec. Order No. 11,760 (European Space Research Org.); Exec. Order No. 11,318 (European Space Research Org., superseded by later Exec. Order No. 11,760).

limitation of the privileges in the event that any international organization should engage, for example, in *activities of a commercial nature*." S. Rep. No. 79-861 at 2 (emphasis added); *see also* 91 Cong. Rec. 12,530 (1945) (House debate confirming that Section 1 addresses situations where an IO or its officer "starts into business over here" or "open[s] up a shipping business" or "engage[s] in other business here").

As stated, Presidents have on eight occasions withheld partial or full immunity from suit and judicial process from designated IOs. They have also withheld other IOIA immunities to deter certain forms of commercial activity. When designating the World Trade Organization an IO, for example, President Clinton withheld immunity from property taxes under IOIA Section 6, 22 U.S.C. § 288c, for any "property, or that portion of property, that is not used for the purposes of the World Trade Organization." Exec. Order No. 13,042. The Executive Order further specified:

> The leasing or renting by the World Trade Organization of its property to another entity or person to generate revenue *shall not be considered a use for the purposes of the World Trade Organization*. Whether property or portions thereof are used *for the purposes* of the World Trade Organization shall be determined within the sole discretion of the Secretary of State or the Secretary's designee.

Id. (emphases added).

This shows that the discretion and flexibility granted to the President under the IOIA allows the Executive to make appropriate immunities determinations for each particular IO to ensure that it only engages in the functions for which it was created. It also provides a further demonstration that the choice between absolute and FSIA-based immunity that Petitioners offer the Court is pure fiction.

When Petitioners and Petitioners' *Amici* Professors warn that foreign states could "evade legal accountability," Brief for Petitioners at 15, or "circumvent the FSIA," Brief of Petitioners' *Amici* Professors at 20, by engaging in commerce through an IO, they betray a misunderstanding of the differences between IOs and foreign states, *see supra* § I.A., and a complete ignorance of the built-in checks on such abuse within the IOIA. Such a theoretical, insidious IO would fail to meet the IOIA's definition of an IO, as it would be implausible to imagine the United States joining it and participating in a fraud upon itself. But even assuming that the U.S. is duped into joining this "Manchurian" IO, once the commercial-type activity becomes apparent, the President is able to withdraw that IO's immunities or revoke its designation under the IOIA.

IV. THE U.S. POLICY CHANGE TO RESTRICTIVE IMMUNITY FOR FOREIGN SOVEREIGNS RESPONDED TO CHANGES IN INTERNATIONAL LAW THAT HAVE NEVER OCCURRED FOR INTERNATIONAL ORGANIZATIONS

A. The Tate Letter Signaled a Change in Foreign Sovereign Immunity Only, Not International Organizational Immunity

Petitioners' *Amici* Professors correctly state that the 1952 Tate Letter marked a "definitive shift to the restrictive theory [of sovereign immunity] as a matter of Executive policy." Brief of Petitioners' *Amici* Professors at 17. No reason exists, however, to believe this change was intended to affect the immunity of IOs. Indeed, there is every reason to think it was not.

The Tate Letter explains the U.S. rationale for adopting the restrictive approach. It speaks of the State Department's study of long-developing changes in international practice concerning sovereign immunity in favor of the restrictive theory. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Phillip B. Perlman, Acting Attorney Gen. (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984, 984-85 (1952) ("Tate Letter"). It then examines in detail that practice across a range of jurisdictions around the world. *Id.* The analysis says nothing about IOs.

Moreover, the three policy justifications the Tate Letter offers for the restrictive approach to sovereign immunity have no application to IOs. First, the Tate Letter states that perhaps the "most persuasive" reason for the change is to deprive "state trading countries" like the Soviet Union of the advantages of absolute immunity. Tate Letter at 985. In other words, the United States wanted to prevent the Soviet Union from abusing sovereign immunity for economic gain. IOs do not participate in inter-state economic

competition; rather, they rely on their functional immunity for protection from local biases and influences when exercising their functions.

The second policy justification is reciprocity. Given that the United States was subjecting itself to suit in tort and contract in foreign jurisdictions, it was sensible to give them the same treatment in U.S. courts. Such reciprocity has no application in the IO context. *See supra* § I.A.

Finally, the Tate Letter notes "the widespread and increasing practice on the part of governments of engaging in commercial activities." Tate Letter at 985. Again, that practice was applicable only to states, not IOs, whose role on the international stage was beginning to take shape after World War II.

B. The United States Did Not Change Its Views with Respect to International Organizational Immunity in the Wake of the Tate Letter

On Petitioners' theory of the case, the Tate Letter's announcement of the change in U.S. policy regarding foreign sovereign immunity should have applied equally to IO immunity. Petitioners' *Amici* Professors try to explain this issue away by claiming that "no occasion arose for testing the applicability of the Tate Letter principles to [international organizations] between 1952 and 1976." Brief of Petitioners' *Amici* Professors at 19. That is not true.

A number of cases indicate that the Tate Letter had no effect on IOs. In *Wencak v. United Nations*, 135 N.Y.L.J.13, at 6, col. 7, (Sup. Ct. NY. Jan. 19, 1956), *also available at* 23 Int'l L. Rep. 509, the

plaintiff sued the U.N. due to an accident involving the U.N. Relief and Rehabilitation Administration. The U.N. moved to dismiss, arguing that it was immune from suit under the IOIA. *Id.* The plaintiff contended, and the court accepted, that "there is a different theory of *sovereign* immunity to-day [*i.e.*, in 1956] than existed some years ago." *Id.* (emphasis added). Nevertheless, the court explained that immunity was a "political rather than a legal question" that was to be decided by "the Department of State rather than the courts," *id.*, and granted the U.N.'s motion to dismiss because the Department of State had "indicated no limitation of the immunity to be conferred" on the U.N. *Id.*

Similarly, between the 1952 Tate Letter and the 1976 FSIA, at least two other U.S. courts stated that the IOIA preserved absolute immunity for IOs, subject to waiver and the President's discretion. *See United States v. Melekh*, 190 F. Supp. 67, 79-80 (S.D.N.Y. 1960); *see also Lutcher S.A. Celulose E Papel v. Inter-Am. Dev. Bank*, 382 F.2d 454, 456 (D.C. Cir. 1967).

The Executive and Legislative Branches also made clear on other occasions that the U.S. policy change to restrictive immunity for foreign states did not affect the nature of IOs' immunity. For example, the Convention on the Privileges and Immunities provides "immunity from every form of legal process" for the "United Nations, its property and assets wherever located and by whomsoever held" except when the United Nations has expressly waived its immunity. Convention on Privileges and Immunities art. II, § 2. The Convention was signed in 1946 and

was presented to Congress for action in 1949 but was not ratified by the United States until 1970.

The 1970 Senate Report in favor of ratification explains that "[t]he 20-year delay between requests for action appears to have been the result of the executive branch being content to operate under the provisions of the [IOIA] and the Headquarters Agreement [between the United States and the U.N.]." S. Exec. Rep. 91-17, at 2 (1970). The Report also states that "the [IOIA] already provides for *the same legal capacities, privileges, and immunities*" for the U.N. as does the Convention on Privileges and Immunities. *Id.* at 3 (emphasis added).

The U.S. Permanent Representative to the U.N. similarly explained that "[m]any of the privileges and immunities" that the Convention provides "*are already enjoyed under the International Organizations and Immunities Act.*" *Id.* at 8 (Statement of Charles W. Yost, U.S. Permanent Representative to the U.N.) (emphasis added). The State Department Legal Adviser likewise stated: "With respect to the United Nations itself, there is no significant change. *Substantially all the privileges and immunities which are granted by the proposed convention are already given by* the headquarters agreement of 1947 and *the International Organizations Immunities Act of 1945.*" *Id.* at 10 (Statement of Hon. John R. Stevenson, Legal Adviser, Dep't of State) (emphases added).

These statements that the IOIA accords the U.N. "the same legal capacities, privileges, and immunities" as does the Convention on Privileges and Immunities (which in turn provides for absolute immunity from "every form of legal process") prove that the U.S. Government did not consider that the policy change to restrictive immunity for foreign states had any effect on the immunity of IOs.[9]

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[9] Petitioners' *Amici* Professors are also incorrect that the "[c]onsistent U.S. [p]osition" after FSIA adoption was that the FSIA's immunity provisions were incorporated into the IOIA. *See* Brief of Petitioners' *Amici* Professors at 22-27. While parts of the Executive Branch have at times written in favor of FSIA incorporation into the IOIA, at other times the Executive Branch has asserted that IOs are entitled to absolute immunity. *See, e.g.*, Brief of the United States as *Amicus Curiae* in Support of Affirmance at 17 & n. *, *EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2d. Cir. 2007) (No. 06-0403-cv, 06-0405-cv, 06-0406-cv) (citing *Atkinson v Inter-Am. Dev. Bank*, 156 F.3d 1335 (D.C. Cir. 1998) approvingly for the proposition that "the [IOIA] provides for absolute immunity of covered organizations"). *See also* Reply in Support of Statement of Interest of the United States of America at 7, *Lempert v. Rice*, 956 F.Supp.2d 17 (D.D.C. 2013) (No. 12-01518) (citing *Atkinson* for the proposition that "the IOIA does not incorporate a commercial activities exception"). Similarly, the Brief for United States as Intervenor at 16, *Veiga v. World Meteorological Org.*, 368 Fed. App'x 189 (2d Cir. 2010) (No. 08-3999-cv), cites the D.C. Circuit's interpretation of the IOIA approvingly and states that it is the "authority of the political branches to define and confer immunities" to IOs, which would not be true if the IOIA incorporated the FSIA's immunity provisions.

Further, legislation was introduced (but not passed) in the 101st Congress to amend the IOIA to make IO immunity equivalent to foreign sovereign immunity under the FSIA. *See* S. Res. 2715, 101st Cong. (1990). This indicates: (1) that members of Congress did not consider the FSIA's immunity rules to already have been

C. The International Law of International Organizational Immunity Is Fundamentally Different from the Law of Sovereign Immunity

This Court has recognized that the enactment of the FSIA, like the Tate Latter before it, "embodies basic principles of international law long followed both in the United States and elsewhere." *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017); *see also id.* at 1320 (noting that the State Department told Congress that "the Act was 'drafted keeping in mind what we believe to be the general state of the law internationally, so that we conform fairly closely . . . to our accepted international standards'" (citation omitted)).

While international law has coalesced around a general acceptance of the theory of restrictive immunity for foreign states, the same is not true for the law of IO immunity. Indeed, international law dictates an entirely different approach to IO immunity. Except only for the Third Circuit's decision in *OSS Nokalva, Inc. v. Eur. Space Agency*, 617 F.3d 756 (3d Cir. 2010), *amici* are aware of *no* example in practice or doctrine where the rules of IO immunity are assimilated to the rules of sovereign immunity.

According to the *Restatement (Third) of the Foreign Relations Law of the United States*, under international law IOs enjoy "such privileges and immunities from the jurisdiction of a member state as

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imported into the IOIA; and (2) that Congress declined to extend the FSIA rules to IOs.

are necessary for the fulfillment of the purpose of the organization, including immunity from legal process, and from financial controls, taxes, and duties." § 467(1). That position appears to be "universally accepted" among scholars in the field. Bekker, *supra*, at 111.

Some observe that this international practice, as reflected in treaties, conventions, and headquarters agreements, generally recognizes IOs' immunity from suit and judicial process unless they waive it. *See, e.g.*, Leonardo D. Gonzalez (Special Rapporteur), "Fourth Report on Relations Between States and International Organizations," U.N. Doc. A/CN.4/424, *reprinted in* 1989 Y.B. Int'l L. Comm'n 153, 161, U.N. Doc. A/CN.4/SER.A/1989/Add.1; Brower, II, *supra*, at 5; Bekker, *supra*, at 111-12. And studies into domestic legislation "reveal[] an international consensus on functional organizational immunities" for IOs. Bekker, *supra*, at 144.

Thus, some scholars have observed "that from the existing instruments and practice a *general rule or principle of international institutional* law has emerged, in the form of the maxim *ne impediatur officia*, . . . that international organizations are entitled to such privileges and immunities as are strictly necessary for the unhampered exercise of functions in the fulfillment of the purposes for which they were created." *Id.* at 151. Moreover, "[w]here a host State is a member of the international organization, even in the absence of a treaty, some courts have upheld the immunity of the international organization as a matter of customary international law." Okeke, *supra*, at 277 (citing decisions from

Italian and Dutch courts).

Interpreting the IOIA to incorporate the immunity rules of the FSIA is therefore inconsistent with the international law of IO immunity and thus violates one of the longest-standing canons of American jurisprudence: the *Charming Betsy* canon. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.").

This problem can easily be avoided by interpreting the IOIA as written in light of its legislative history and historical context. So understood, the IOIA sets a default rule pursuant to which IOs are immune from suit and every form of judicial process in the United States, subject to the President's unquestioned power to depart from that default rule when he considers it appropriate in light of an IO's functions.

V. ADOPTING PETITIONERS' CONSTRUCTION OF THE IOIA WOULD DRAMATICALLY CHANGE U.S. POLICY

Petitioners' incorrect contentions about U.S. policy concerning IO immunity obscure the severe consequences of adopting Petitioners' construction of the IOIA. As shown by Respondent, IOs have long relied on the immunity from suit and every form of judicial process in the United States that the IOIA confers, subject to the President's discretion. This immunity "is rooted in the need to protect international organizations from unilateral control by a member nation over the activities of the

international organization within its territory." *Mendaro v. World Bank*, 717 F.2d 610, 615 (D.C. Cir. 1983). The IOIA was passed to free IOs from these concerns by "protect[ing] the official character of international organizations located in this country," as well as to "strengthen the position of international organizations of which the United States is a member when they are located or carry on activities in other countries." H.R. Rep. No. 79-1203, at 2.

Petitioners' construction, if accepted, would strip IOs of these long-standing protections and subject them to suit and other forms of judicial process in U.S. courts. Were other countries to follow suit, U.S. personnel working for IOs abroad—sometimes in unfriendly nations—would likewise be at risk of being exposed, directly or indirectly, to the jurisdiction of other states' courts. The door would be open wide to unwelcome state interference in the functioning of IOs, especially in countries where those organizations operate.

Writing in 1979, the U.N. warned of exactly this danger: "If any state could, through its courts, bend the operations of an organization to the laws of that state, all other states could do likewise with respect to their laws, thus possibly paralyzing or fragmenting the organization." U.N. *Broadbent Amicus* Br. at 5; *see also* Alice Ehrenfeld, *United Nations Immunity Distinguished from Sovereign Immunity*, 52 Am. Soc'y Int'l L. Proc. 88, 91 (1958); Bekker, *supra*, at 103 ("The uniformity of the organization, which is essential to the performance by the organization of its designated purposes, would be endangered were it forced to defend its actions in the municipal courts of

various States.").

The magnitude of the change Petitioners request is significant. As discussed, incorporating the FSIA's immunity provisions into the IOIA would take IO immunity decision away from the President and place them in the hands of the courts. This would lead to a surge in domestic litigation against IOs that, like this case, have only a tenuous connection to the United States. The Brief of *Amici Curiae* Center for International Environmental Law, *et al.* demonstrates the substantial litigation interest that multiple plaintiffs' counsel have in the outcome of this case.

As Respondent's Brief explains, the Petitioners could not have brought an action in the United States against the Indian corporations directly responsible for the alleged harm. *See* Brief for Respondent at 55. They also could not sue the IFC in India, the country with the greatest interest in this case, because the IFC enjoys immunity from suit there. *See* Indian Ministry of External Affairs Notification No. D-II/451/12(21)/2009, Gazette of India, pt. II sec. 3(ii) (July 13, 2016). Even on Petitioners' theory of the case, they can sue the IFC here only because it is headquartered in Washington. The potential for suits against IOs based solely on the happenstance that they are located in the United States raises serious foreign policy concerns and encourages forum shoppers to flock to U.S. courts.

Petitioners themselves point out that "[m]any international organizations are headquartered in the United States." Brief for Petitioners at 3. If the FSIA

and the restrictive immunity principles it embodies applied to IOs, it is entirely possible that IOs would choose to relocate. The President would also be hampered in his ability to enter into agreements with or regarding new IOs.

This Court has shown restraint when construing laws in ways that would have the judiciary decide issues with important foreign policy implications. *See, e.g., Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 124 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004). Indeed, in circumstances raising less sensitive foreign policy concerns, the Court has held that the political branches are better placed to make the requisite policy decisions. *See Jesner v. Arab Bank*, 138 S. Ct. 1386, 1407 (2018) (litigation against foreign corporations under the Alien Tort Statute triggers "serious foreign policy consequences" (quoting *Kiobel*, 569 U.S. at 124)). The Court should show that same restraint in this case.

The Court has also warned about the consequences of sudden changes of immunities. *See Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 571-73 (1926) ("A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and perceived obligations of the civilized world." (quoting *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812))). The Court should not breach faith where the statutory language lends itself to a simpler approach.

The consequences to IOs, especially those headquartered in the United States, and to U.S. foreign policy interests are too severe to adopt Petitioners' construction. The better approach is to permit the political branches to make any changes to IO immunity law that they may consider warranted.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the decision of the D.C. Circuit.

Respectfully submitted,

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No. 17-1011

In the
Supreme Court of the United States

BUDHA ISMAIL JAM, et al.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR *AMICI CURIAE* MEMBER COUNTRIES AND THE MULTILATERAL INVESTMENT GUARANTEE AGENCY IN SUPPORT OF RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Multilateral Investment Guarantee Agency is a multilateral development organization and a member of the World Bank Group. 181 member countries are shareholders of MIGA.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i
TABLE OF AUTHORITIES iii
STATEMENT OF INTEREST 1
SUMMARY OF ARGUMENT 2
ARGUMENT 6
I. Broad Immunity Best Reflects And Protects The Interests And Policy Objectives Of International Organizations And Their Members 6
A. Member Countries Formed and Continue to Participate in International Organizations Against a Backdrop of Broad Immunity 7
B. International Organization Immunity Serves Critical Purposes That Are Distinct From the Purposes of Foreign Sovereign Immunity 15
II. Congress' Decision To Grant The Executive Branch The Power To Alter International Organization Immunity Reinforces The Understanding That The IOIA Creates A Baseline Of Broad Immunity 20
CONCLUSION 27

TABLE OF AUTHORITIES

Cases

Almendarez-Torres v. United States,
523 U.S. 224 (1998) 25

Atkinson v. Inter-Am. Dev. Bank,
156 F.3d 1335 (D.C. Cir. 1998) 22

Jesner v. Arab Bank, PLC,
138 S. Ct. 1386 (2018) 19

Republic of Austria v. Altmann,
541 U.S. 677 (2004) 6, 11, 23

Zivotofsky v. Kerry,
135 S. Ct. 2076 (2015) 22

Statutes

22 U.S.C. §288 ..... 2, 21, 25, 26

22 U.S.C. §288a 2, 6, 10, 11

28 U.S.C. §1605 ..... 13, 14

28 U.S.C. §1611 26

Regulations

Exec. Ord. No. 9,751 (July 11, 1946) 14

Exec. Ord. No. 10,680,
21 Fed. Reg. 7647 (Oct. 2, 1956) 14

Exec. Ord. No. 11,059 (Oct. 23, 1962) 24

Exec. Ord. No. 11,718 (May 14, 1973) 24

Exec. Ord. No. 12,359 (Apr. 22, 1982) 24

Exec. Ord. No. 12,425 (June 16, 1983) 24

Exec. Order No. 12,647 (Aug. 2, 1988) 14

Exec. Ord. No. 13,042 (Apr. 9, 1997) 23

Other Authorities

91 Cong. Rec. 10,866 (1945) 10

91 Cong. Rec. 12,530 (1945) 23

Articles of Agreement of the Int'l Finance Corp., May 25, 1955, 264 U.N.T.S. 118..... 12, 14, 18, 19

Articles of Agreement of the Int'l Monetary Fund, Dec. 27, 1945, 2 U.N.T.S. 40..... 8, 9, 14, 19

Charter of the United Nations (June 26, 1945)..... 9

Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, 1508 U.N.T.S. 99..... 12, 14, 19

Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press 2018)..... 16

Edward Reilly Stettinius Jr., U.S. Dep't of State, Pub. No. 2349, *Charter of the United Nations: Report to the President on the Results of the San Francisco Conference* (June 26, 1945)..... 9, 10

Eric De Brabandere, *Immunity of International Organizations in Post-Conflict International Administrations*, 7 Int'l Orgs. L. Rev. 79 (2010) 16, 17, 19, 20

H.R. Rep. No. 79-1203 (1945)..... 11

Notes, *Jurisdictional Immunities of Intergovernmental Organizations*, 91 Yale L. J. 1167 (1982) 6, 20, 22

S. Rep. No. 79-861 (1945) 10, 25

STATEMENT OF INTEREST[1]

Amici are the Multilateral Investment Guarantee Agency ("MIGA") and member countries that belong to MIGA, the International Finance Corporation ("IFC"), and/or other international organizations. *Amici* offer the perspective of both international organizations and the member countries that comprise and support them. As such, *amici* are uniquely well positioned to speak to the understanding on which members agreed to form and/or join these organizations, to base them in the United States, and to continue to fund and otherwise participate in them. *Amici* also can speak to the destructive impact it would have on their membership and missions if the broad immunity that they have long been understood to enjoy under the International Organizations Immunities Act ("IOIA") were eliminated.

The member countries that have joined this brief as *amici* are the Islamic Republic of Afghanistan, the Republic of Austria, the People's Republic of Bangladesh, the Kingdom of Belgium, the Republic of Benin, the Federative Republic of Brazil, the Republic of Côte d'Ivoire, the Arab Republic of Egypt, the Republic of Guinea, the Republic of India, the Republic of Indonesia, the Republic of Kenya, the United Mexican States, the Islamic Republic of Pakistan, the

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

Republic of Peru, the Republic of Rwanda, and the Republic of Senegal.

SUMMARY OF ARGUMENT

When Congress enacted the International Organizations Immunities Act in 1945, it gave international organizations "the same immunity from suit ... as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract." 22 U.S.C. §288a(b). The Act also provided that this immunity could be adjusted by the President. *Id.* §288.

Congress enacted the IOIA on the heels of the formation of three of the world's most critical international organizations: the United Nations, the World Bank, and the International Monetary Fund. The founding documents of each of those organizations obligated member countries to ensure that their own domestic law immunized the organization from suit for activities within their borders. And that is precisely what the IOIA did; the Act conferred immunity upon these nascent international organizations, each of which was headquartered in the United States, by reference to the virtually absolute immunity from suit that foreign sovereigns enjoyed at the time that the statute was enacted. Indeed, there is no serious question that, in the immediate wake of the IOIA's passage, international organizations were granted virtually absolute immunity under the IOIA, subject only to whatever adjustments were made through their own waivers or by discrete decisions

involving particular circumstances made by the executive branch.

It is against the backdrop of virtually absolute immunity that sovereigns throughout the world agreed to allow the United States to host these international organizations. And over the coming years, countries proceeded to form and headquarter in the United States a myriad of other international organizations, including the International Finance Corporation ("IFC") in 1956 and the Multilateral Investment Guarantee Agency ("MIGA") in 1988. Just as the background understanding of broad immunity from suit animated these organizations' formation in general, and their location in the United States in particular, that immunity remains critical to their membership and missions today. Indeed, without independence from the undue control or influence of any one member (including any one member's court system), international organizations would not be able to attract the broad membership that they presently enjoy, or to raise the capital that is essential to their ability to achieve their objectives.

Notwithstanding the undisputed fact that international organizations enjoyed broad immunity in the immediate wake of IOIA's passage, petitioners now contend that the immunity of international organizations was radically contracted when Congress enacted a different statute, the Foreign Sovereign Immunities Act of 1976 ("FSIA"), that says next to nothing about the immunity of international organizations. No one made the argument that petitioners now advance in 1976 when the FSIA was being debated in Congress or otherwise put

international organizations on notice that their IOIA immunity was at grave risk. And with good reason, as the argument makes little sense given the distinct nature of international organizations, whose member countries work as part of a collective body and continue to need the broad immunity the United States promised in 1945.

There is no better illustration of that than the context in which this case arises. According to petitioners, the FSIA subjects international organizations to the same exception to immunity for their "commercial activities" to which foreign sovereigns are subject under the FSIA. That exception is reasonable and relatively narrow when it comes to foreign sovereigns, which typically engage in far more functions as a sovereign than as a commercial actor. The exception also applies equitably to all sovereigns, which almost without exception engage in some commercial activity and much more sovereign activity. But as applied to international organizations, and particularly those organizations that, like the IFC and MIGA, engage principally in activities that could be characterized as "commercial," a "commercial activity" exception could have a radically different effect on organizations depending on their mission and in many important instances could swallow IOIA immunity whole. Indeed, at least by petitioners' telling, it is hard to imagine what activities by organizations like the IFC and MIGA would *not* qualify as commercial.

That result is fundamentally inconsistent with the statutory background against which member countries founded international organizations, agreed to headquarter them in the United States, and have

continued to fund and otherwise participate in them. The IOIA gave international organizations and their member countries every reason to believe that the immunity of international organizations would remain intact, subject only to waiver by the organization or action by the executive branch. By its plain terms, the IOIA expressly leaves to the President sensitive decisions about whether and how to alter or withhold the otherwise virtually absolute immunity that the statute confers.

There is thus no need to look to the evolving law of foreign sovereign immunity to ensure that the IOIA remains a "dynamic" statute. Congress already accomplished that task by granting the President that power—a power that the FSIA certainly does not purport to curtail. Moreover, international organizations and their member countries are well experienced with dealing with the executive branch, which is the principal organ of the U.S. government in diplomatic relations with both international organizations and foreign nations. It makes far more sense to leave any changes in the scope of international organization immunity to those diplomatic discussions than to have them turn on subsequent legislation addressing a different subject. And maintaining the broad immunity codified in the IOIA best supports the critical missions of international organizations and their member countries.

ARGUMENT

I. Broad Immunity Best Reflects And Protects The Interests And Policy Objectives Of International Organizations And Their Members.

When Congress enacted the IOIA in 1945 and gave international organizations "the same immunity from suit ... as is enjoyed by foreign governments," 22 U.S.C. §288a(b), foreign governments enjoyed virtually absolute immunity in the courts of the United States. *See Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004); Notes, *Jurisdictional Immunities of Intergovernmental Organizations*, 91 Yale L. J. 1167, 1171 (1982) ("In 1945 ... foreign governments were absolutely immune from the jurisdiction of both state and federal courts in the United States."). Under the "classical or absolute" theory of sovereign immunity that governed at the time, a sovereign could not, "without his consent, be made a respondent in the courts of another sovereign." *Altmann*, 541 U.S. at 690. Accordingly, absent their own waivers or a contrary decision by the executive branch, foreign sovereigns could not be sued in U.S. courts. Thus, it is beyond dispute that when Congress enacted the IOIA in 1945, what it conferred on international organizations was a virtually absolute immunity from suit.

That same virtually absolute immunity is precisely what international organizations and their members understood the IOIA to confer. And it is against the backdrop of that broad immunity that many such organizations, and their member countries, decided to house those organizations in the

United States. That broad immunity, moreover, is what every signatory country, including the United States, promised when the critical post-World-War-II international organizations were formed. And that broad immunity remains critical to ensuring the continued independence, funding, and operation of those organizations today.

A. Member Countries Formed and Continue to Participate in International Organizations Against a Backdrop of Broad Immunity.

Since the end of World War II, when the United States and its allies combined to form the World Bank and the United Nations, sovereign nations have formed and joined a whole host of international organizations on the understanding that those organizations would enjoy virtually absolute immunity from suit in the courts of the United States (and elsewhere). Indeed, the IOIA itself was a product of exactly that understanding, and its codification of the traditional, broad conception of immunity that governed at the time was the backdrop against which member countries agreed to locate many international organizations—including the UN, the World Bank, the IMF, the IFC, and MIGA—in the United States.

As World War II came to a close, the United States hosted two conferences that resulted in what continue to be some of the world's most critical international organizations: the Bretton Woods Conference in Bretton Woods, New Hampshire, which produced the IMF and the World Bank; and the San Francisco Conference, which produced the UN. More than 700 delegates from more than 40 allied nations gathered

at Bretton Woods in July 1944 to discuss the regulation of international monetary and financial order. And they ultimately created the IMF and the World Bank, institutions that would play an indispensable role in repairing the economic destruction that the war had wrought.

In the Articles of Agreement that they formed for the IMF, the delegates devoted an entire Article to "Status, Immunities and Privileges." *See* Articles of Agreement of the Int'l Monetary Fund, Art. IX, §§1-10, Dec. 27, 1945, 2 U.N.T.S. 40, 72-74 ("IMF Articles of Agreement"). That Article specifically provided that, "[t]o enable the Fund to fulfill the functions with which it is entrusted, ... [t]he Fund shall possess full juridical personality," and "[t]he Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceedings or by the terms of any contract." *Id.* §§1-3.[2] The Article also expressly obligated each member country to "take such action as is necessary in its own territories for

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[2] In addition to immunity from suit, the Articles also establish immunities insulating "[p]roperty and assets of the Fund, wherever located and by whomsoever held, ... from search, requisition, confiscation, expropriation or any other form of seizure by executive or legislative action," *id.* §4; immunity of the Fund's archives, *id.* §5; freedom of the Fund's archives from "restrictions, regulations, controls and moratoria of any nature," *id.* §6; privileges for the Fund's "official communications," *id.* §7; broad immunities and privileges for the Fund's officers and employees (including "[a]ll governors, executive directors, alternates, officers and employees of the Fund"), *id.* §8; and immunity "from all taxation and from all customs duties," *id.* §9.

the purpose of making effective in terms of its own law the principles set forth in this Article." *Id.* §10.

The UN's charter, which resulted from the 1945 San Francisco Conference, likewise obligated members to confer absolute immunity on the UN with respect to fulfillment of its functions. *See* Charter of the United Nations (June 26, 1945), Article 105 ("The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes."). The originating documents of these foundational international organizations thus not only made clear what kind of immunity they needed to fulfill their missions, but also imposed a concrete international law obligation on the United States and other member countries to ensure that their own domestic law conformed with that obligation and conferred broad immunity on the organizations.

As the United States itself recognized at the time, that obligation was particularly critical for any nation that hoped to host an international organization. Following the San Francisco Conference, the Secretary of State explained that because the UN would be governed by and funded by contributions from "all of the member states," it should "clearly not [be] subject to the jurisdiction or control of any one of them." Edward Reilly Stettinius Jr., U.S. Dep't of State, Pub. No. 2349, *Charter of the United Nations: Report to the President on the Results of the San Francisco Conference* 159 (June 26, 1945). And the United States assured the world community that it "share[d] the interest of all Members in seeing that no state hampers the work of the [o]rganization[s]

through the imposition of unnecessary local burdens." *Id.*

The United States ratified the IMF Articles of Agreement in July 1945, and it ratified the UN Charter in October 1945. Two months later, on December 29, 1945, Congress enacted the IOIA, which conferred on international organizations "the same immunity from suit ... as is enjoyed by foreign governments." 22 U.S.C. §288a(b). As the IOIA's legislative history explains, Congress intended the statute to assure the world that international organizations of all stripes would have broad immunity in the United States. As the Senate Report explained, "[w]hile the need for such legislation has existed for some time, the problem has become of pressing importance only in the last few years in connection with the increased activities of the United States in relation to international organizations" and, in particular, "in the international conferences in connection with the creation of UNRRA, the International Monetary Fund and International Bank, the Food and Agriculture Organization of the United Nations, and others." S. Rep. No. 79-861, at 2 (1945).

The Senate Report also specifically discussed how the IOIA "would be an important indication of the desire of the United States to facilitate fully the functioning of international organizations in this country" (*i.e.*, in the United States). *Id.* at 2-3. Indeed, the legislative history is replete with discussion of the need to assure broad immunity to encourage other countries to house international organizations in the United States. *See, e.g.*, 91 Cong. Rec. 10,866 (1945)

(statement of Rep. Cooper) ("[I]f we are to hope to have the United Nations Organization's headquarters to be located in the United States, it will be absolutely essential for [some form of immunity-granting] legislation to be passed."); H.R. Rep. No. 79-1203, at 2 (1945) ("[T]he probability that the United Nations Organization may establish its headquarters in this country, and the practical certainty in any case that it would carry on certain activities in this country, makes it essential to adopt this type of legislation promptly.").

Particularly when viewed against that backdrop, there can be no serious dispute that member countries agreed to let the United States host organizations like the UN, the World Bank, and the World Bank's affiliated international organizations on the understanding that the IOIA conferred upon international organizations virtually absolute immunity from suit. For one thing, that was plainly the "immunity from suit ... enjoyed by foreign governments" at the time, 22 U.S.C. §288a(b), as the "classical or absolute" theory of sovereign immunity governed in the United States until 1952. *See Altmann*, 541 U.S. at 690. Moreover, the legislative history just discussed confirms that the United States repeatedly informed the world that it enacted the IOIA to ensure that all international organizations would have the broad immunities and privileges necessary to enable those organizations to fulfill their functions.

Since the IOIA's enactment, the foundational documents and understanding that led to the location of the bedrock post-war international organizations

have not changed. Moreover, the foundational documents of other international organizations based in the United States have continued to reflect a felt need for virtually absolute immunity, not some abstract interest in parity with sovereign immunity. The IFC's Articles of Agreement, for example, include an Article on "Status, Immunities and Privileges" that establishes broad immunity "[t]o enable the Corporation to fulfill the functions with which it is entrusted" and provides that those "status, immunities and privileges ... shall be accorded to the Corporation in the territories of each member." Articles of Agreement of the Int'l Finance Corp., Art. VI, §1, May 25, 1955, 264 U.N.T.S. 118, 142 ("IFC Articles of Agreement"); *see also id.* §§2-11. MIGA's articles-of-agreement equivalent likewise includes a chapter on "Privileges and Immunities" that establishes broad immunity "[t]o enable the Agency to fulfill its functions" and provides that those "immunities and privileges ... shall be accorded to the Agency in the territories of each member." Convention Establishing the Multilateral Investment Guarantee Agency, Ch. VII, Art. 43, Oct. 11, 1985, 1508 U.N.T.S. 99, 114 ("MIGA Convention"); *see also id.* Arts. 44-50.

It is hard to believe that the 180-plus nations that comprise these organizations would have agreed to allow the United States to host them had they understood the immunity granted by the IOIA to be subject to the kinds of broad exemptions contained in the FSIA. That is particularly true as to organizations like the World Bank, the IFC, the IMF, the Inter-American Development Bank, the Inter-American Investment Corporation, and MIGA, which employ commercial means for their missions of international

development. Under the FSIA's "commercial activity" exception, "[a] foreign state shall not be immune" from any suit based on (1) "a commercial activity carried on in the United States by the foreign state," (2) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or (3) "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. §1605(a)(2).

In the context of the foreign sovereigns that are the repeated and emphatic subject of that provision, the commercial activity exception reflects that commercial activities are different from the core sovereign activities that are essential to a nation. And, in practice, such an exception may be significant, but it is hardly devastating, as most sovereigns engage principally in sovereign activity, not commercial activity financed by a consortium of sovereigns after internal political negotiation by member countries, in furtherance of the global public good. But when that same exception is applied to an international organization designed to facilitate international development through commercial activity, such an exemption would go to the very essence and *raison d'etre* of the organization and threaten to undermine the protection offered by its immunity.

After all, some of the earliest organizations to receive immunity under the IOIA are ones that routinely engage in what may be deemed as commercial activities. For instance, the World Bank and the IMF were designated international organizations by executive order in 1946, Exec. Ord.

No. 9,751 (July 11, 1946), and the IFC followed not long after in 1956, Exec. Order No. 10,680, 21 Fed. Reg. 7647 (Oct. 2, 1956). And MIGA was designated by executive order upon its creation in 1988—more than a decade after the FSIA was enacted. *See* Exec. Order No. 12,647 (Aug. 2, 1988). Each of these organizations has as its core mission things that petitioners characterize as "commercial activity" for purposes of the FSIA. *See* 28 U.S.C. §1605(a)(2).

The IMF's mission is "[t]o promote international monetary cooperation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems," IMF Articles of Agreement, Art. I, and MIGA's mission is "to encourage the flow of investments for productive purposes among member countries, and in particular to developing member countries," MIGA Convention, Ch. I, Art. 2. Likewise, the IFC's mission is "to further economic development by encouraging the growth of productive private enterprise in member countries, particularly in the less developed areas." IFC Articles of Agreement, Art. I. To that end, its primary activities include "assist[ing] in financing the establishment, improvement and expansion of productive private enterprises which would contribute to the development of its member countries by making investments"; "bring[ing] together investment opportunities, domestic and foreign private capital, and experienced management"; and "stimulat[ing], and ... creat[ing] conditions conducive to, the flow of private capital, domestic and foreign, into productive investment in member countries." *Id.* Again, by petitioners' telling, all of these activities that lie at the

core of these organizations' missions would be excluded from IOIA's otherwise stable, uniform, and predictably broad immunity by virtue of the FSIA's "commercial activity" exception.

To be sure, arguments can be made that activities in furtherance of an international organization's core mission are outside the scope of what Congress had in mind when it enacted the "commercial activity" exception to the FSIA. *See* IFC Br. 50-60. But such arguments confirm that the Congress that enacted the FSIA was not legislating with the specific functions and immunity needs of international organizations in mind. In all events, it is hard to believe that more than 180 nations would have agreed to allow the United States to host these essential organizations on the hope that they could convince a court to read an exception into the FSIA's exception for commercial activities for international organizations whose core mission is commercial. That is particularly so given the background understanding of broad immunity against which so many international organizations were formed and housed in the United States.

B. International Organization Immunity Serves Critical Purposes That Are Distinct From the Purposes of Foreign Sovereign Immunity.

The understanding that the IOIA confers traditional, virtually absolute immunity, rather than pursuing some misplaced parity rationale and forever tying the immunity of international organizations to that of sovereign nations, is reinforced by the distinct purposes that international organization immunity and sovereign immunity are intended to serve.

While "both states and international organizations are well-established subjects of international law," the reasons for granting immunity to international organizations are "dissimilar to those underlying state immunity, or diplomatic immunity." Eric De Brabandere, *Immunity of International Organizations in Post-Conflict International Administrations*, 7 Int'l Orgs. L. Rev. 79, 82-83 (2010); *see also* Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* 352-65 (Oxford University Press 2018). And those distinct reasons have given international organizations and their member countries every reason to believe that international organization immunity would continue to be broad, and would continue to be governed by the distinct statute that Congress enacted for the specific purpose of dealing with international organizations, not by an entirely separate statute that deals only with foreign sovereign immunity and says next to nothing about international organizations.

State immunity and the related diplomatic immunity generally stem from principles of sovereign equality of states and non-intervention in the internal affairs of other states. *Immunity of International Organizations*, 7 Int'l Orgs. L. Rev. at 83. Immunity for international organizations and their staff, by contrast, is more functional, *i.e.*, it is essential to their ability to attract and retain members and achieve their missions. International organizations are not themselves sovereigns, but they are composed of multiple—indeed, often a multitude of—sovereigns. The IFC and the IMF have 189 member countries; MIGA has 181. Each of these members has unique

sovereign interests, and the nature and level of their participation in these organizations varies immensely. Moreover, while there are plenty of international organizations, such as the UN and the Organization of American States, that have quasi-sovereign functions, there are many others, like the IFC and MIGA, that engage principally in commercial or other types of activities. That combination of factors makes broad immunity from suit critical to the ability of these organizations to function in a way that ensures that no sovereign can exercise undue leverage over the actions of the collective through the withdrawal of immunity, and makes wholly inappropriate significant exceptions for subject matters that could correspond with an organization's principal function.

First, 180-some member countries are far less likely to agree to take part in an organization as to which a single member enjoys considerable advantages over others. That concern is particularly pronounced as to the host state. Given its physical proximity to the organization, the host state could claim the power to assert jurisdiction over nearly everything an international organization does. But it "would clearly compromise the independence of the organization if it could be subjected to pressure for the official (judicial) institutions of the host state." *Immunity of International Organizations*, 7 Int'l Orgs. L. Rev. at 88. Accordingly, "ensur[ing] that the host state cannot exercise any influence over the organization is fundamental in contributing to the maintenance of the sovereign equality of states," and to guarding against "unilateral control by one or more states of the organization." *Id.* at 85. And that

independence is best ensured by broad immunity from suit.

Moreover, precisely because such organizations consist of member countries, holding an international organization "liable" for monetary damages poses distinct complications. Many organizations (particularly those like the IMF, the IFC, and MIGA that have as their core missions stimulating economic growth in developing countries) have some members who principally fund their activities, and others who principally benefit from them. Member countries that serve principally as contributors are much less likely to continue to fund those missions if they must contribute not only to the costs of accomplishing them, but to the costs of fending off lawsuits.

That is all the more true given that, unlike when it is making a unilateral investment, a contributing country may not have complete control over the projects in which the organization chooses to invest its funds, let alone the methods by which the organization does so. That is what makes absolute immunity from suit—and particularly immunity for commercial activities—so critical to the ability of international organizations "to fulfill the functions with which [they are] entrusted." IFC Articles of Agreement, Art. VI, §1. The delicate internal process of diplomacy, which reflects the intricate balance of powers at play in these organizations, is a far superior measure to the blunt instrument of resolution of these questions through one country's judicial system. *See* Br. of *Amici Curiae* Former Exec. Branch Att'ys in Supp. of Resp't.

It is no answer to suggest that many lawsuits against international organizations would ultimately

be dismissed as meritless. Even meritless litigation is incredibly costly, and time- and cost-intensive lawsuits impose considerable settlement pressure. Moreover, the complications that inevitably attend international disputes have a tendency to exacerbate these problems. To take a recent example, it took *15 years* and a trip to this Court to achieve dismissal in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), and many other suits involving international conduct have dragged on just as long (or settled for exorbitant amounts). More fundamentally, "national courts are simply not the appropriate *fora* to deal with claims brought against international organizations," which often implicate sensitive foreign relations concerns. *Immunity of International Organizations*, 7 Int'l Orgs. L. Rev. at 85.

Consistent with these dynamics, the articles of formation of international organizations routinely emphasize that broad immunity is critical to the organization's ability "to fulfill the functions with which it is entrusted." IFC Articles of Agreement, Art. VI, §1; *see also, e.g.*, IMF Articles of Agreement, Art. IX, §1 (establishing broad immunity "[t]o enable the Fund to fulfill the functions with which it is entrusted"); MIGA Convention, Ch. VII, Art. 43 (establishing broad immunity "[t]o enable the Agency to fulfill its functions" and provides that those "immunities and privileges ... shall be accorded to the Agency in the territories of each member"). As those and other comparable statements confirm, both international organizations and their member countries have long understood the immunity that such organizations enjoy to cover all of the core functions that they serve.

That broad immunity from suit is essential to preserve the independence of the organization, and to ensure that it will be able to function as a cohesive unit, without fear of undue interference or judicial reprisal by a single member country. That is all the more evident in our increasingly global world. International organizations "are indispensable in a world in which problems and potentials extend beyond individual nations." *Jurisdictional Immunities*, 91 Yale L. J. at 1183. Yet as the missions and undertakings of international organizations become ever more "comprehensive," *Immunity of International Organizations*, 7 Int'l Orgs. L. Rev. at 80, the potential exposure to litigation becomes ever more expansive (and expensive). As their own founding documents reflect, without broad immunity from such litigation, international organizations simply cannot continue to function as they do, or to marshal the resources of a consortium of member countries to act collectively to further the global public good.

II. Congress' Decision To Grant The Executive Branch The Power To Alter International Organization Immunity Reinforces The Understanding That The IOIA Creates A Baseline Of Broad Immunity.

The longstanding understanding that the IOIA confers virtually absolute immunity is eminently reasonable, as that is the understanding reflected in the statute itself. Petitioners seek to portray the IOIA as reflecting a congressional intent to create a parity between international organization immunity and foreign sovereign immunity, such that the mechanism

for adjusting international organization immunity would come through subsequent congressional modifications of foreign sovereign immunity. The text of the IOIA tells a different story. Indeed, the IOIA expressly identifies the mechanism through which the 1945 Congress intended to deal with changes in the appropriate scope of international organization immunity: The statute gives the President the power "to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided ... or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity." 22 U.S.C. §288. And the statute empowers the President "to revoke the designation of any international organization" entirely for "abuse by an international organization or its officers and employees of the privileges, exemptions, and immunities provided." *Id.*

Petitioners' attempt to convert this case into a choice between a "static" IOIA (with immunity fixed in 1945) and a "dynamic" one (where international organization immunity shifts along with foreign sovereign immunity) thus presents a false dichotomy. There is no need to look to the FSIA or anything else to avoid "lock[ing] in a rule that international organizations [a]re entitled to absolute immunity from suit." Petrs' Br. 36. The IOIA itself already creates all the flexibility Congress intended by giving the executive branch broad authority to withhold, condition, or revoke the otherwise-absolute immunity of international organizations and their officers and employees. That "built-in mechanism for updating the IOIA undermines [petitioners] claim that Congress

intended a different updating mechanism"—*i.e.*, reference to "developments in the law governing the immunity of foreign sovereigns." *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998); *see also Jurisdictional Immunities*, 91 Yale L. J. at 1170 ("the IOIA itself was carefully structured to provide broad and flexible controls for the immunities it conferred, including Presidential power unilaterally to modify or revoke them").

Congress' decision to delegate responsibility for adjusting international organization immunity to the executive branch is eminently sensible, as it is the executive branch that is principally tasked with dealing with the foreign relations dynamics that such issues present. *Cf. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085-86 (2015). Indeed, international organizations and their member countries are well experienced with dealing with the executive branch, as that is the principal organ of the U.S. government in diplomatic relations with both international organizations and foreign nations. It makes far more sense, and is far more consistent with member-country expectations, to leave any changes in the scope of international organization immunity to diplomatic discussions than to have them turn on subsequent legislation addressing a different subject.

Congress' decision to leave changes to the scope of international organization immunity to the President also belies petitioners' claim that the IOIA incorporates the entire body of foreign sovereign immunity law, as opposed to the substantive rule of immunity that governed at the time. Before the FSIA, "initial responsibility for deciding questions of

sovereign immunity fell primarily upon the Executive." *Altmann*, 541 U.S. at 690. Accordingly, if the IOIA really did just make international organizations equivalent to foreign sovereigns in all respects, then there would have been no need for Congress to specify that the President could withhold, constrain, or revoke the immunity of an international organization, as the President already would have had that power. Congress' felt need to grant the President that power underscores its intention to incorporate into the IOIA a *substantive* rule of virtually absolute immunity. As previously noted, the reference to the then-extent rule of virtually absolute foreign sovereign immunity was a useful way of enacting that substantive rule. But Congress' evident intent was to confer virtually absolute immunity on international organizations, not to establish a rule of parity for parity's sake.

Petitioners protest that the §288 power was intended only to allow "the President to police abuses of official status," not to serve "as a mechanism for updating the background rules applicable to international organization immunity." Petrs' Br. 30, 34-35 (citing 91 Cong. Rec. 12,530 (1945)) (noting that President "can withdraw the privileges from the employees of [a] foreign organization" that "starts functioning here and goes beyond the scope for which it was created"). Seventy years of historical practice proves otherwise. Presidents have routinely invoked §288 to carve out particular activities or assets of an international organization, without regard to any "abuse" by the organization or its members. *See, e.g.*, Exec. Ord. No. 13,042 (Apr. 9, 1997) (designating World Trade Organization but limiting its

immunities). Indeed, petitioners themselves cite several executive orders that constrained immunity in situations where there was no indication of "abuse" or "unauthorized activity." *See* Petrs' Br. 30 n.5.[3]

More fundamentally, petitioners' concession that Congress intended international organizations to have immunity for the core purposes for which they were created is fatal to their attempt to graft the FSIA onto the IOIA, for the FSIA exceptions that petitioners would impose on international organizations could virtually eliminate many such organizations' immunities under the IOIA. Presidents have long conferred immunity under the IOIA on international organizations that use commercial means to achieve their global objectives. *See supra* pp.12-14. Yet by petitioners' telling, the FSIA could swallow those IOIA immunities whole.

That result makes no sense. There is nothing in the IOIA indicating that Congress intended to draw a distinction between organizations that engage in principally "sovereign" activities and organizations that engage in principally "commercial" ones. Nor is there anything indicating that Congress intended the scope of the immunity conferred by the IOIA to turn

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[3] Citing Exec. Ord. No. 12,425 (June 16, 1983) (designating INTERPOL but limiting its immunities); Exec. Ord. No. 12,359 (Apr. 22, 1982) (designating International Food Policy Research Institute but limiting its immunities); Exec. Ord. No. 11,718 (May 14, 1973) (designating International Telecommunications Satellite Organization but limiting its immunities); Exec. Ord. No. 11,059 (Oct. 23, 1962) (designating Inter-American Tropical Tuna Commission, Great Lakes Fishery Commission, and International Pacific Halibut Commission but limiting their immunities).

on the nature or mission of the organization in question. Instead, IOIA's statutory language plainly reflects Congress' intention to allow the President to make sensitive decisions about whether an organization or its activities warrants a departure from the default rule of virtually absolute immunity that the IOIA creates. *See* 22 U.S.C. §288; S. Rep. No. 79-861, at 2 (1945) (explaining that IOIA gives President the power to "adjust[] or limit[] ... the privileges" of international organizations).

Interpreting the FSIA to abrogate immunities conferred by a statute enacted more than *30 years* earlier would be all the more problematic because the later-enacted FSIA says nothing at all about the immunity of international organizations. The FSIA does not "declare the meaning of earlier law"; does not "seek to clarify an earlier enacted general term"; does not "depend for [its] effectiveness upon clarification, or a change in the meaning of an earlier statute"; and certainly does not "reflect any direct focus by Congress upon the meaning of the earlier enacted provisions." *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998). And there is nothing in the legislative history even hinting at the notion that Congress understood the FSIA to curtail the immunity of international organizations. Nor would that have made any sense given the distinct purposes that international organization and sovereign immunity serve. *See supra* Part I.B.

Indeed, to the extent the FSIA sheds any light at all on the subject, it affirmatively undermines petitioners' position that the FSIA was intended to constrict international organization immunity. The

FSIA references the IOIA a grand total of once, providing that the property of an international organization—including funds it seeks to disburse to a foreign nation—may not be subject to attachment or any other process to execute a judgment against a foreign nation. 28 U.S.C. §1611(a). Not only does that provision confirm that the FSIA is not intended to alter the scope of immunity under the IOIA; it also confirms that to the extent Congress was concerned with international organizations at all when it enacted the FSIA, its sole concern was with ensuring that the FSIA would not diminish the immunity of international organizations, even with respect to what may be deemed their commercial activities.

In sum, if this case boils down to a debate about what mechanism best provides for sufficiently "dynamic" adjustment of international organization immunity, Congress has already answered that question: The IOIA leaves it to the President to alter the scope of the immunity of international organization "in ... light of the functions performed by any such international organization." 22 U.S.C. §288. That decision makes eminent sense as a policy matter; it has garnered decades of reliance interests; and nothing in the FSIA purports to alter or repeal it.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the D.C. Circuit.

Respectfully submitted,

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Supreme Court of the United States

BUDHA ISMAIL JAM, et al.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS OF INTERNATIONAL ORGANIZATION AND INTERNATIONAL LAW IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. THE IOIA OF 1945, ADOPTED AT A TIME OF FLUX IN IMMUNITIES PRACTICE, INSTRUCTS COURTS TO DRAW ON FOREIGN SOVEREIGN IMMUNITY PRINCIPLES IN EFFECT AT THE TIME OF SUIT. 4

A. In 1945, Immunity Rules for IOs Were Unsettled, and Congress Envisioned That They Would Continue to Change 6

B. Around the Time of the IOIA's Passage, the United States Was Negotiating Agreements That Generally Follow a Functional Approach to IO Immunity. 9

C. U.S. Policy Favoring a Restrictive Approach to Foreign Sovereign Immunity Crystallized Quickly Between 1945 and 1952 and Became Applicable to IOs Whose Immunities Are Not Otherwise Governed by International Agreement. 16

D. Neither the IOIA nor Any Subsequent Development in Immunities Law Contemplates That IOs Would Enjoy Different Immunities Than Required by International Agreement or Than States Enjoy at the Time of Suit.....18

II. APPLICATION TO IOS OF THE RESTRICTIVE PRINCIPLES EMBODIED IN THE FSIA PRODUCES A COHERENT, WORKABLE APPROACH THAT COMPLIES WITH U.S. INTERNATIONAL OBLIGATIONS. 19

A. The Consistent U.S. Position from the Earliest Post-1976 Cases Onward Has Been That the Restrictive Principles of the 1976 FSIA Apply to IOs. 22

B. The IOIA/FSIA Combination Ensures Fulfillment of All U.S. Obligations Under International Agreements for Immunities of IOs. 27

C. Except as Specifically Required by U.S. International Agreements, IOs Are Not Entitled to Different Immunities Than Foreign States. 29

D. Application of the FSIA's Restrictive Principles to IOs Would Lift Immunity Only Where There is Sufficient U.S. Nexus to Justify Federal Jurisdiction. 31

CONCLUSION 33

Appendix A LIST OF *AMICI CURIAE* 1a

Appendix B List of U.S. Treaties and Agreements on Immunities of International Organizations, 1945-1955 (Chronological by Date of Signature) ..3a

TABLE OF AUTHORITIES

CASES

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 32

Berizzi Bros. Co. v. The Pesaro, 271 U.S. 562 (1926) 16

Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co., 137 S. Ct. 1312 (2017) 21, 26, 33

Broadbent v. Organization of American States, 628 F.2d 27 (D.C. Cir. 1980) 22

Jam v. International Finance Corp., 860 F.3d 703 (D.C. Cir. 2017) 26

Mendaro v. World Bank, 717 F.2d 610 (D.C. Cir. 1983) 24

The Navemar, 303 U.S. 68 (1938) 17

North Haven Board of Education v. Bell, 456 U.S. 512 (1982) 26

OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015) 32

OSS Nokalva, Inc. v. European Space Agency, 617 F.3d 756 (3d Cir. 2010) 20

Permanent Mission of India to United Nations v. City of New York, 551 U.S. 193 (2007) 30, 32

Ex parte Peru, 318 U.S. 578 (1943) 17

The Pesaro, 277 F. 473 (S.D.N.Y. 1921) 16

Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250 (2014) 21, 32

Republic of Mexico v. Hoffman, 324 U.S. 30 (1945) 17

Rubin v. Islamic Republic of Iran, 138 S. Ct. 816 (2018) 21

Tuck v. Pan American Health Organization, 668 F.2d 547 (D.C. Cir. 1981) 24

Whitney v. Robertson, 124 U.S. 190 (1888) 27

STATUTES

22 U.S.C. § 288 21

22 U.S.C. § 288a 5

22 U.S.C. § 288a(b) 2, 3, 4

22 U.S.C. § 288a(d) 30

22 U.S.C. § 288d(a) 30

28 U.S.C. § 1604 27

28 U.S.C. § 1605(a)(1) 21, 31

28 U.S.C. § 1605(a)(2) 21, 31

28 U.S.C. § 1605(a)(3) 32

28 U.S.C. § 1605(a)(4) 21, 30, 32

28 U.S.C. § 1605(a)(5) 21, 32

28 U.S.C. § 1605A 32

28 U.S.C. § 1605B 32

Diplomatic Relations Act, 92 Stat. 808, Pub. L. No. 95-393 (1978) 31

LEGISLATIVE MATERIALS

H.R. Rep. No. 79-1203 (1945) 8, 9

S. Rep. No. 79-861 (1945) 8, 14

OTHER AUTHORITIES

Kuljit Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (1964) 8

Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134 10

Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, T.I.A.S. No. 1501, 2 U.N.T.S. 39 10

William W. Bishop, Jr., Editorial Comments, *New United States Policy Limiting Sovereign Immunity*, 47 Am. J. Int'l L. 93 (1953) 18

Brief for the United States as *Amicus Curiae*, *Broadbent v. Organization of American States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465) 23

Brief of United States as *Amicus Curiae*, *Corrinet v. United Nations*, No. 96-17130 (9th Cir. Mar. 12, 1997), 1997 WL 33702375 .. 24, 29

Brief for the United States as Intervenor, *Veiga v. World Meteorological Organization*, No. 08-3999cv (2d Cir. May 1, 2009), 2009 WL 8186687 25

Charter of the Organization of American States, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3 28

Charter of the United Nations and Statute of the International Court of Justice, Oct. 24, 1945, 59 Stat. 1031, T.S. No. 993 11

Charter of the United Nations: Report to the President on the Results of the San Francisco Conference, U.S. Dep't of State, Pub. No. 2349 (1945) 11

Convention on International Civil Aviation, done at Chicago, Dec. 7, 1944, entered into force Apr. 4, 1947, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 11

Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations, done at New York, Nov. 21, 1947, entered into force Dec. 2, 1948, 33 U.N.T.S. 261 12

Convention on the Privileges and Immunities of the United Nations, done at New York, Feb. 13, 1946, entered into force Sept. 17, 1946, entered into force for the United States Apr. 29, 1970, 21 U.S.T. 1418, T.I.A.S. No. 6900, 1 U.N.T.S. 15 ..... 12, 28

Giorgio Gaja, *Jurisdictional Immunity of International Organizations, in Report of the International Law Commission on the Work of its 58th Session*, 2006 Y.B. Int'l L. Cmmn, Vol. II, Part 2, Annex II, 201 20

4 Green H. Hackworth, *Digest of International Law* (1943) 6-7

C. Wilfred Jenks, *The Headquarters of International Institutions: A Study of Their Location and Status* (Royal Inst. of Int'l Affs., 1945) 7-8

C. Wilfred Jenks, *International Immunities* (1961) 8

Philip C. Jessup, Editorial Comments, *Status of International Organizations: Privileges and Immunities of Their Officials*, 38 Am. J. Int'l L. 658 (1944) 7, 10

Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 Am. J. Int'l L. 828 (1947) 7

Arthur K. Kuhn, Editorial Comments, *United Nations Monetary Conference and the Immunity of International Agencies*, 38 Am. J. Int'l L. 662 (1944) 10

Letter from Roberts B. Owen, Legal Adviser of the Department of State, to Leroy D. Clark, General Counsel of the Equal Employment Opportunity Commission, June 24, 1980, excerpted in Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917 (1980) 24, 29

Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in, 26 Dep't State Bull. 984 (1952) 17

Letter from Secretary of State to Speaker of the House and President Pro Tempore of the Senate Transmitting the Convention on Privileges and Immunities of the United Nations (May 12, 1947), in Foreign Relations of the United States, 1947, The United Nations, Vol. 1, at https://history.state.gov/historicaldocuments/frus1947v01/d19 15

Letter of Submittal, Headquarters Agreement with Organization of American States, S. Treaty Doc. No. 102-40 (Sept. 21, 1992) 25

Lawrence Preuss, *The International Organizations Immunities Act*, 40 Am. J. Int'l L. 332 (1946) 6, 7

Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11) 7, 13

Report of the Preparatory Commission of the United Nations, UN Doc. PC/20 (Dec. 23, 1945) 14

Restatement (Third) of the Foreign Relations Law of the United States (1987) 25

S. Treaty Doc. No. 102-40 (1992), *reprinted in Digest of United States Practice in International Law 1991-1999*, at 1015, 1016-17 (Sally J. Cummins & David P. Stewart, eds., 2005) 25

Michael J. Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 Va. J. Int'l L. 53 (1995) 20

Sponsorship by the Department of State of Legislation Resulting in the International Organizations Immunities Act of 1945, 1 Foreign Rel. U.S. 1557 (1945) 8

UN G.A. Res. 22(I)(D) (Feb. 13, 1946) 14

INTEREST OF AMICI CURIAE[1]

Amici are professors with expertise in international organizations and international law, including the application of international law by U.S. courts. (A List of *Amici* is in Appendix A.) *Amici* have a range of experience with the U.S. and international law applicable to international organizations. They include former officials of the U.S. Department of State who have represented the United States in international organizations and have participated in the development of international and U.S. law relevant to the immunities of such organizations. *Amici* seek to present their views on the interaction between the International Organizations Immunities Act of 1945 (IOIA) and other bodies of law, including the international and domestic understandings of foreign sovereign immunity and international organizational immunity as of 1945 when the IOIA was adopted; as of 1952 when the United States Executive Branch embraced a restrictive view of sovereign immunity on policy grounds; and as of 1976 when the restrictive doctrine was codified into U.S. statutory law.

Amici limit their submission to issues of the immunities of international organizations in U.S. law in general. They do not take a position on the claims

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[1] In accordance with Supreme Court Rule 37.3(a), all parties consented to the filing of this brief. Petitioners and Respondent provided blanket consent for all *amicus* briefs on June 27 and July 2, 2018, respectively. As required by Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made any monetary contribution intended to fund this brief.

advanced in the pending case, and in particular they express no opinion on whether these claims qualify for denial of immunity under a restrictive theory, which would be a question for the lower courts to decide on remand. *Amici* are united in the view that the IOIA anticipates changes in the applicable doctrines of immunity, and that the changes to restrict foreign sovereign immunities as announced by the Executive in 1952 and codified by the Congress in 1976 are applicable *mutatis mutandis* to the immunities of international organizations.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The IOIA does not give international organizations (IOs) absolute immunity from suit. Rather, in light of the IOIA's text and context, IOs enjoy the same immunities as those available to foreign states at the time of suit, unless an international agreement requires otherwise.

I. The IOIA provides that IOs enjoy "the same immunity" from suit "as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). With this language, the IOIA placed IOs on the same footing as foreign governments for purposes of immunity from suit. It did not freeze the law of IO immunity in 1945, but rather granted IOs whatever immunity is due foreign governments at the time the immunity is claimed.

That Congress intended to allow the law of IO and foreign sovereign immunity to evolve is evident from the text of the IOIA and the context in which it was enacted. To begin, because there was no developed law of IO immunity in the United States, the IOIA borrowed an

analogy from foreign sovereign immunity law; that body of law was rapidly evolving and Congress expected it would continue to do so. The negotiating history of key international agreements being developed around 1945 was a consequential backdrop for Congress's own debate and further suggests that Congress intended the law of IO immunity to continue to evolve, as many of these agreements adopted a functional rather than absolute approach to IO immunity. During this same time period, the Executive and Judicial Branches were moving away from absolute immunity for foreign sovereigns, too. Against this backdrop, it is implausible that Congress meant for IOs to benefit from different immunity than foreign states enjoy or than international agreements require.

II. The 1976 Foreign Sovereign Immunities Act (FSIA) provided a new and more comprehensive set of default rules for foreign sovereign immunity—and thus for the IOs, whose immunity is "the same" as the immunity of foreign governments. 22 U.S.C. § 288a(b). The FSIA codifies the restrictive theory of immunity that the Executive had already embraced decades earlier, with enumerated exceptions for categories of suits for which Congress determined that immunity should not apply. In the absence of other rules prescribed by international agreements, it is the 1976 criteria—not an outmoded theory of absolute immunity—that govern IO immunity today.

Applying the restrictive principles embodied in the FSIA to IOs is consistent with the text of the IOIA and has been the considered Executive position on how the two statutes interact. It also produces a coherent,

workable approach to IO immunity that accounts for the growing participation of IOs in commercial activities. A contrary approach allowing IOs to enjoy absolute immunity would make little sense: It would insulate IOs engaging in commercial activity in the United States or whose commercial activities have direct effects in the United States from liability in U.S. courts, when foreign governments enjoy no such immunity. Because the FSIA explicitly preserves all existing international agreements, applying the FSIA criteria in cases against IOs is fully consistent with the international obligations of the United States.

ARGUMENT

I. THE IOIA OF 1945, ADOPTED AT A TIME OF FLUX IN IMMUNITIES PRACTICE, INSTRUCTS COURTS TO DRAW ON FOREIGN SOVEREIGN IMMUNITY PRINCIPLES IN EFFECT AT THE TIME OF SUIT.

The International Organizations Immunities Act of 1945, 22 U.S.C. § 288a(b) (IOIA), provides that designated international organizations (IOs), their property, and their assets "*shall enjoy the same immunity from suit* and every form of judicial process *as is enjoyed by foreign governments.*"[2] The circuits are

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[2] The IOIA specifies:

§ 288a. Privileges, exemptions, and immunities of international organizations ....

(b) International organizations, their property and their assets, wherever located, and by whomsoever held, *shall enjoy the same*

divided on whether the IOIA froze a rule of absolute immunity for IOs as of 1945 by adopting what some courts have assumed to be the then-applicable rule for foreign governmental immunity regardless of subsequent changes, or whether "same immunity" under the IOIA places IOs on the same footing as foreign governments at the time that immunity is claimed.

Amici submit that Congress could not possibly have meant to insist on rigid application of an approach to immunity that was already obsolescing in 1945 and would very soon be definitively rejected for cases against foreign governments. To insist on allowing IOs to benefit today, in the absence of obligations arising from international agreements, from an approach to immunity that was already rapidly disappearing when the IOIA was enacted is anachronistic.

As *Amici* will demonstrate, principles of IO immunity and foreign governmental immunity were undergoing rapid development in 1945, as regards both international and domestic law and practice. Congress did not expect the law to remain static in this area, nor was it in a position to prescribe policy guidance for IO immunities at a time when there had been virtually no experience to draw on. Rather than enshrining a fixed rule for all time, Congress merely specified a default rule by borrowing the closest (albeit imperfect) analogy at

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immunity from suit and every form of judicial process *as is enjoyed by foreign governments*, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.
22 U.S.C. § 288a (emphasis added).

hand—the treatment of foreign governments—in the expectation that relevant law, including international agreement-based rules, would be quickly developing. Congress made no independent policy judgment that IOs ought to enjoy a given level of immunity as a matter of law for the indefinite future, and in particular would not have intended IOs to benefit from a different level of immunity than foreign governments enjoy, long after the rationale for according absolute immunity to foreign sovereigns had been discredited and abandoned. Under a proper reading of the IOIA, unless an international agreement requires otherwise, IOs should not enjoy different immunities than those available to foreign states at the time of suit.

A. In 1945, Immunity Rules for IOs Were Unsettled, and Congress Envisioned That They Would Continue to Change.

On the IOIA's enactment date, December 29, 1945, international law governing IO activities was in an embryonic stage, and U.S. practice with respect to IOs was virtually non-existent. As a non-member of the League of Nations, the main international organization of the interwar period, the United States had no occasion to confer immunity on the League, nor did the United States take any relevant position on the immunity of the handful of organizations in which the United States had participated before 1945.[3] Neither international custom

[3] The U.S. position was that customary international law did not require extending to IOs the privileges and immunities of foreign governments. Lawrence Preuss, *The International Organizations Immunities Act*, 40 Am. J. Int'l L. 332, 333 (1946); 4 Green H.

nor treaties had moved very far toward elaborating a body of immunity principles for IOs until after the creation of the United Nations, its specialized agencies, and numerous regional and technical bodies. International law scholars writing just before and just after 1945 underscored the paucity of precedents for IO immunity and the need for a whole body of new law to be created essentially from scratch.[4] First principles of an international law for IOs would only begin to be hammered out later in the 1940s, with such basic questions as the nature of the international personality of the new generation of IOs and their capacities and powers still to be determined.[5]

Hackworth, *Digest of International Law* 419-23 (1942). Nor was there relevant U.S. practice relating to immunity of the International Labor Organization or the only regional organization with an office on U.S. territory, namely the Pan American Sanitary Bureau.

[4] E.g., Preuss, *supra* n.3; Philip C. Jessup, Editorial Comments, *Status of International Organizations: Privileges and Immunities of Their Officials*, 38 Am. J. Int'l L. 658 (1944) (proliferation of IOs will raise the problem of their immunities afresh); Josef L. Kunz, *Privileges and Immunities of International Organizations*, 41 Am. J. Int'l L. 828, 846-47 (1947) ("The problem of privileges and immunities of the international organizations themselves is obviously a new problem.... The building-up of a new and complete international law concerning this topic will have to take into consideration the following problems [suggesting seven areas].").

[5] Cf. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11) (addressing capacity of United Nations to bring an international claim on behalf of its agent). On the uncertain state of IO immunity law as of 1945 and its rapid development within just a few years, *see* C. Wilfred

U.S. leadership at the Bretton Woods conference in July 1944, the Chicago conference on civil aviation in December 1944, and the San Francisco conference to negotiate the Charter of the United Nations in June 1945 foreshadowed a pragmatic, functionally-based approach to IO immunities. *See infra* Part I.B. To ensure a domestic legal framework for putting into effect the immunities of the organizations that the United States was contemporaneously expecting to join, the Department of State prepared a draft of what would become the IOIA and worked with Congress to have a barebones IO immunities statute in place by the end of 1945.[6]

As reflected in the language and legislative history of the IOIA, Congress was well aware of the novelty of creating such a statute and did not intend to freeze the development of IO immunity by virtue of the decision to borrow the closest analogy at hand.[7] The House Report for the bill that led to the IOIA observed that, in 1945, there existed "no law of the United States whereby this country can extend privileges of a governmental

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Jenks, *The Headquarters of International Institutions: A Study of Their Location and Status* (Royal Inst. of Int'l Affs., 1945); C. Wilfred Jenks, *International Immunities* (1961); Kuljit Ahluwalia, *The Legal Status, Privileges and Immunities of the Specialized Agencies of the United Nations and Certain Other International Organizations* (1964).

[6] On the Department's role in drafting the legislation, *see* Sponsorship by the Department of State of Legislation Resulting in the International Organizations Immunities Act of 1945, 1 Foreign Rel. U.S. 1557-67 (1945).

[7] *See* H.R. Rep. No. 79-1203 (1945); S. Rep. No. 79-861 (1945).

character with respect to international organizations or their officials in this country." [8] Thus the bill was presented "to fill th[e] need" for such a law.[9]

B. Around the Time of the IOIA's Passage, the United States Was Negotiating Agreements That Generally Follow a Functional Approach to IO Immunity.

Contemporaneous materials reflect the international context for negotiating and implementing IO immunities: IOs would receive a level of immunity appropriate to their new functions; but unless new international agreements so required, IOs would in no case receive different immunities than those applicable to foreign governments. These materials came to the attention of members of Congress in various ways in 1944-1945, including when some influential members participated in the parallel international negotiations of the 1940s to develop the first generation of IO immunity agreements. Those members of Congress continued to pay attention to specific modalities of functional IO immunity through this first generation.

It is important to understand the main approaches to IO immunity in the period surrounding the enactment of the IOIA and in the first decade thereafter, leading up to the negotiation of the immunities provisions in the 1955 agreement constituting the International Finance Corporation (Respondent here). Details concerning

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[8] H.R. Rep. No. 79-1203 at 2.
[9] *Id.*

immunities clauses between the 1945 UN Charter and the 1955 IFC Articles of Agreement are in Appendix B.

In 1944 and 1945, with the end of World War II in view, U.S. diplomats and lawyers were laying the foundational architecture for a new generation of IOs and new approaches to their privileges and immunities. In negotiating the articles of agreement for the International Monetary Fund and the International Bank for Reconstruction and Development (World Bank) in 1944 at the Bretton Woods conference,[10] the United States took distinctly different approaches to the privileges and immunities of these two new bodies, tailoring them to the bodies' different functions.[11] The

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[10] On the conscious choice that these bodies would enjoy different levels of immunity as reflected in their articles of agreement, *see* Jessup, *supra* n.4, at 659-60. Jessup noted that there was less detailed treatment in the draft constitution for the Food and Agriculture Organization; meanwhile, government departments and legislatures "will, of necessity, continue to grope for a satisfactory solution." *Id.* at 662; *see also* Arthur K. Kuhn, Editorial Comments, *United Nations Monetary Conference and the Immunity of International Agencies*, 38 Am. J. Int'l L. 662 (1944).

[11] The Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, 1413, T.I.A.S. No. 1501, 2 U.N.T.S. 39, 74, take an expansive approach in Article IX: "The fund, its property and its assets, wherever located and by whomever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceeding or by the terms of any contract." By contrast, the Articles of Agreement of the International Bank for Reconstruction and Development, Dec. 27, 1945, 60 Stat. 1440, 1457-58, T.I.A.S. No. 1502, 2 U.N.T.S. 134, 180, envision that the Bank could be sued, by providing in Article VII(3): "Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a

Chicago conference on international civil aviation reached agreement in December 7, 1944 on a convention envisioning a new International Civil Aviation Organization with legal capacity as "necessary for the performance of its functions," but its privileges and immunities were not yet specified.[12] The UN Charter negotiated in San Francisco in June 1945 indicated that the Organization would "enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes."[13]

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member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank."

[12] Convention on International Civil Aviation, done at Chicago, Dec. 7, 1944, entered into force Apr. 4, 1947, 61 Stat. 1180, 1193, T.I.A.S. No. 1591, 15 U.N.T.S. 295, 328, Art. 47: "The Organization shall enjoy in the territory of each contracting State such legal capacity as may be necessary for the performance of its functions. Full juridical personality shall be granted wherever compatible with the constitution and laws of the State concerned."

[13] Charter of the United Nations and Statute of the International Court of Justice art. 105(1), signed at San Francisco June 26, 1945, entered into force, Oct. 24, 1945, 59 Stat. 1031, 1053, T.S. No. 993. The Secretary of State's Report to the President on the San Francisco Conference stated that the United States would need appropriate legislation to implement Article 105. *See* Charter of the United Nations: Report to the President on the Results of the San Francisco Conference, U.S. Dep't of State, Pub. No. 2349, at 160 (1945). The details were provided in a Convention on Privileges and

Meanwhile, also in the mid-1940s, agreements constituting what would become UN specialized agencies were being negotiated. Their clauses on privileges and immunities generally took a functional approach, with variations in the particular formulas used, in the expectation that more precise terms would be formulated in a Convention on the Privileges and Immunities of the Specialized Agencies of the United Nations ("Special Convention"), which would take shape shortly after the completion of the General Convention.[14]

It was expected that the United States would soon join most or all of these organizations, and indeed the United States was already in the process of doing so. As a constitutional matter, the necessary domestic approvals were obtained either from the Senate under the treaty process specified in Article II of the Constitution (as was done for the UN Charter), or

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Immunities of the United Nations ("General Convention"), which would be developed and completed in early 1946. Convention on the Privileges and Immunities of the United Nations, done at New York, Feb. 13, 1946, entered into force Sept. 17, 1946, entered into force for the United States Apr. 29, 1970, 21 U.S.T. 1418, 1422, T.I.A.S. No. 6900, 1 U.N.T.S. 15, 16, 18, Section 2: "The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expresly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."

[14] Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations, done at New York, Nov. 21, 1947, entered into force Dec. 2, 1948, 33 U.N.T.S. 261. The United States has not ratified the Special Convention.

through joint resolutions or statutes (as was done for the Bretton Woods institutions, the UN headquarters agreement, and various other agreements).[15] Under either mode of approval, Congress was apprised of U.S. obligations to accord privileges and immunities, and members of Congress carefully scrutinized the nature of the commitments being made, to ensure that privileges and immunities no higher or lower than those required by the particular organization were conferred.

A review of the negotiating history of the key agreements, and of the legislative history of the IOIA and other measures considered by Congress in the years just before and after its enactment, belies the notion that Congress's reference to the "same immunity . . . as is enjoyed by foreign governments" meant that IOs could enjoy different immunity than required by international agreements approved by the Senate or Congress, or different immunity than foreign governments would enjoy, as U.S. policy regarding the immunity of foreign governments shifted. *See infra* Part I.C.

Significant evidence comes from the report of the chairman of the U.S. delegation to the San Francisco Conference, discussing Articles 104-105 of the UN Charter: "The Committee which discussed this matter was anxious to avoid any implication that the United Nations will be in any sense 'a super-State'."[16] Further

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[15] *See* Appendix B for details on selected agreements.

[16] Report to the President on the Results of the San Francisco Conference, U.S. Dep't of State, Pub. No. 2349 (1945). Cf. *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. at 179 (concluding that the United Nations is

evidence comes from the discussions within the UN Preparatory Commission, occurring almost simultaneously with the congressional consideration of the IOIA, which recognized and reinforced the principle that the extent of IO immunities would be determined and limited by their functions.[17] Within this context, the IOIA's legislative history reflects a congressional assumption that to the extent that IOs might become involved in commercial activity, they should not be entitled to immunity.[18]

Senator Arthur Vandenberg's statement as a member of the U.S. delegation to the UN General Assembly meeting in February 1946 offers further evidence of contemporaneous sensitivity in Congress to potentially excessive claims of IO immunity. In his statement, the Senator reserved the U.S. position on certain aspects of the General Convention and explained that the United States would abstain in the vote on the

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an international person, while observing: "That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a 'super-State,' whatever that expression may mean.").

[17] *See* Report of the Preparatory Commission of the United Nations, UN Doc. PC/20 61-62 (Dec. 23, 1945) ("[I]t must be recognized that not all specialized agencies require all the privileges and immunities which may be needed by others. ... It should be a principle that no immunities and privileges, which are not really necessary, should be asked for."). For confirmation that the specialized agencies should enjoy *only* such privileges and immunities as are necessary for their functions, *see* UN G.A. Res. 22(I)(D) (Feb. 13, 1946).

[18] S. Rep. No. 79-861, at 2 (engaging in commercial activity would constitute grounds for revoking immunity).

Special Convention.[19] When the General Convention was transmitted to both Houses of Congress the following year, the Secretary of State's report noted that the IOIA and the General Convention were overlapping but not identical; the administration asked that "extensive amendment of [the IOIA] be deferred until such time as the need for privileges and immunities on the part of international organizations throughout the world shall have become clarified."[20]

Whether the newly emerging IOs would, in fact, be entering the marketplace as commercial actors was a major uncertainty of the mid-1940s. Given the international negotiations of which Congress was aware, which were in the process of clarifying the levels of immunity that specific IOs would require, it is highly doubtful that Congress meant to enshrine in the IOIA an immunity for commercially active IOs that was already suspect for foreign governments and government-owned entities. *See infra* Part I.C.

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[19] Statement of Senator Vandenberg, Feb. 1946, quoted in Letter from Secretary of State to Speaker of the House and President Pro Tempore of the Senate Transmitting the Convention on Privileges and Immunities of the United Nations 33-34 (May 12, 1947), *in Foreign Relations of the United States, 1947, The United Nations*, Vol. 1, at https://history.state.gov/historicaldocuments/frus1947v01/d19 ("Letter of Transmittal"). Senator Vandenberg's intervention noted that Congress might have to go beyond the IOIA in respect of certain privileges and immunities of IO-affiliated personnel.

[20] Letter of Transmittal at 36. Congressional approval of the General Convention in fact was deferred until 1970.

C. U.S. Policy Favoring a Restrictive Approach to Foreign Sovereign Immunity Crystallized Quickly Between 1945 and 1952 and Became Applicable to IOs Whose Immunities Are Not Otherwise Governed by International Agreement.

As this Court has recognized in its foreign sovereign immunity cases, U.S. practice on immunity was undergoing transformation in the mid-twentieth century, with the pivot of those changes coinciding closely with enactment of the IOIA. The contours of a general shift away from absolute immunity for foreign sovereigns toward a restrictive approach were already evident when Congress needed to legislate some form of IO immunity in 1945. In light of growing awareness as of 1945 that foreign governmental immunity could well soon crystallize around a restrictive rather than absolute approach, there is no basis for construing the IOIA to freeze a particular level of immunity for IOs in perpetuity.

Already by the early decades of the twentieth century, the Executive Branch began to advocate for removing sovereign immunity for some forms of private activity carried out by foreign states. *See The Pesaro*, 277 F. 473, 479-80 & n.3 (S.D.N.Y. 1921) (noting State Department's position that merchant vessel owned by foreign state should not be immune from suit). Although this Court did not accept that view at the time, *see Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562 (1926), by mid-century the Executive and Judicial Branches would converge in curtailing immunity for foreign governments' commercial acts. In the years leading up

to the IOIA's enactment, this Court shifted its approach from independent evaluation of immunity claims (as in *Berizzi*) to deference to the Executive Branch's stance, with particular care taken not to accord different immunity than the Executive thought warranted. *See Ex parte Peru*, 318 U.S. 578 (1943); *The Navemar*, 303 U.S. 68, 71 (1938). In *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945), this Court followed the Executive's rejection of immunity, making clear that it is "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." By 1952, in a document known as the Tate Letter,[21] the State Department announced a definitive shift to the restrictive theory as a matter of Executive policy, thereby inaugurating a quarter-century of practice in which the courts followed *Hoffman* in giving conclusive effect to Executive determinations of non-immunity in cases involving the commercial activities of foreign states.

The Tate Letter did not spring fully formed from the pen of the Acting Legal Adviser on May 19, 1952. Rather, as its first sentence acknowledged, the State Department "has *for some time* had under consideration the question whether the practice of the Government in granting immunity ... should not be changed."[22] The Tate Letter surveyed trends in judicial decisions and international agreement practice that had been

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[21] Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in*, 26 Dep't State Bull. 984 (1952).

[22] *Id.* (emphasis added).

gathering support among many countries since the 1920s and addressed the policy reasons favoring a U.S. shift to a restrictive approach, including the growing involvement of foreign states in commercial activities.

The trends motivating the 1952 announcement of a definitive change in U.S. policy on foreign sovereign immunity were already evident in 1945, as *Mexico v. Hoffman* indicates.[23] In the context of a decades-long shift away from absolute to restrictive immunity for foreign states, it is implausible that Congress in 1945 assumed a static conception of foreign governments' immunity when extending such immunity to IOs whose immunities would not otherwise be specified by international agreement.

D. Neither the IOIA nor Any Subsequent Development in Immunities Law Contemplates That IOs Would Enjoy Different Immunities Than Required by International Agreement or Than States Enjoy at the Time of Suit.

As enacted in 1945, the IOIA provided a default rule for determining IO immunity, by assimilating the rules for IOs and foreign governments with respect to their immunity from suit and judicial process. As noted above, a default rule was needed, and needed quickly, in order to allow the United States to begin joining IOs and hosting them on U.S. territory, without the delays that

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[23] On growing support for restrictive immunity from the early twentieth century through the Tate Letter, *see* William W. Bishop, Jr., Editorial Comments, *New United States Policy Limiting Sovereign Immunity*, 47 Am. J. Int'l L. 93 (1953).

would necessarily accompany any attempt to formulate a detailed code of immunity rules in the absence of preexisting models or precedents. Within a few years, numerous specific agreements supplanted the default rule for the IOs to which they pertained. Also within a few years—seven at most—absolute foreign sovereign immunity could no longer have been the applicable default rule, because that rule had been superseded by the new U.S. policy announced in the Tate Letter. Although no occasion arose for testing the applicability of Tate Letter principles to IOs between 1952 and 1976, the restrictive principle embraced in 1952 for foreign sovereign immunity would have been the "same immunity" for any IO not covered by an international agreement in this period.

The enactment of the 1976 FSIA provided a new and more comprehensive set of default rules—immunity for foreign sovereigns under a restrictive theory, with enumerated exceptions for categories of suits for which Congress has determined such sovereigns should not enjoy immunity. As Part II explains, it is the 1976 criteria, and not an outmoded theory of absolute immunity, that should govern IO immunity.

II. APPLICATION TO IOS OF THE RESTRICTIVE PRINCIPLES EMBODIED IN THE FSIA PRODUCES A COHERENT, WORKABLE APPROACH THAT COMPLIES WITH U.S. INTERNATIONAL OBLIGATIONS.

Application to IOs of the restrictive principles embodied in the 1976 FSIA is consistent with the text of

the IOIA and produces a coherent, workable approach to IO immunity that accounts for the growing participation of IOs in commercial activities.[24] Moreover, the default principles codified in the FSIA are far more appropriate than a supposed rule of absolute immunity that was already on its way out in 1945.

By contrast, adherence in 2018 and beyond to an absolute theory of immunity for IOs that was obsolescing in 1945—and that had been abandoned for foreign states by Executive policy in 1952 and by Congress in 1976—would be outdated and dysfunctional. This approach would insulate IOs engaging in commercial activity in the United States or whose commercial activities have direct effects in the United States from liability in U.S. courts. And it would allow foreign states to circumvent the FSIA by conducting their commercial activities through an international organization, to avoid liability for their otherwise non-immune commercial activity. *Accord OSS Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 764 (3d Cir. 2010).[25]

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[24] Cf. Giorgio Gaja, *Jurisdictional Immunity of International Organizations, in Report of the International Law Commission on the Work of its 58th Session*, 2006 Y.B. Int'l L. Comm'n, Vol. II, Part 2, Annex II, 201, 202, U.N. Doc. A/61/10 (increased importance of economic activities of IOs, often in direct competition with the private sector).

[25] Absolute immunity for IOs could also provide a vehicle for states to avoid their human rights obligations by channeling certain activities through IOs—a prospect that has been called "not fanciful." *See* Michael J. Singer, *Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns*, 36 Va. J. Int'l L. 53, 58, 64 n.38 (1995).

As this Court's decisions explain, the FSIA now provides a "comprehensive set of legal standards governing claims of immunity," *Republic of Argentina v. NML Capital Ltd.*, 134 S. Ct. 2250, 2255 (2014), which are consistent with international law and with all obligations under existing international agreements. *See also Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017) (explaining that the FSIA was intended to conform to relevant international law). The basic structure of the FSIA establishes a default rule of immunity (§ 1604), *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 822 (2018), subject to specified exceptions, e.g. for waiver (§ 1605(a)(1)), commercial activity (§ 1605(a)(2)), immovable property located in the forum (§ 1605(a)(4)), and torts committed in the forum's territory (§ 1605(a)(5)).

The FSIA also confers upon the courts, rather than the Executive Branch, the responsibility for deciding claims of immunity. This approach, too, is the proper one to apply to IOs today and far preferable to either a blanket rule of absolute immunity for IOs or case-by-case executive determinations. Although the IOIA contains authority for the Executive Branch to adjust IO immunity on a case-by-case basis, [26] the same considerations that motivated Congress to prescribe criteria of general applicability for foreign sovereigns and transfer to the courts the responsibility to determine their application in particular cases are no less pertinent in actions against IOs. Not surprisingly,

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[26] 22 U.S.C. § 288.

just as the Executive Branch welcomed enactment of the FSIA, it has fully endorsed the application of the FSIA's substantive criteria to IOs by the courts.

A. The Consistent U.S. Position from the Earliest Post-1976 Cases Onward Has Been That the Restrictive Principles of the 1976 FSIA Apply to IOs.

Very soon after the entry into force of the FSIA in 1977—indeed within that calendar year—the legal question of the impact of the FSIA on IO immunity was already reaching U.S. courts, beginning with a suit brought in November 1977 against the Organization of American States.[27] By October 1978, the Executive Branch had formulated its position on the question of the interaction between the FSIA and the IOIA and conveyed it to the Court of Appeals for the D.C. Circuit in the following terms:

> [T]here can be, we submit, no question that since the passage two years ago of the [Foreign Sovereign] Immunities Act international organizations are now fully subject to suit in American courts for their acts *jure gestionis*. The suggestion advanced below by the *amici* that the International Organizations Immunities Act somehow ossified in 1945 the doctrine of absolute foreign sovereign immunity with respect to international organizations is devoid of substance. ...

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[27] *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (filed in district court in November 1977).

> The opinion expressed in the district court's order of January 25, 1978, that the "express language and the statutory purposes underlying the International Organizations Immunities Act of 1945 bring international organizations within the terms of the Foreign Sovereign Immunities Act of 1976" was manifestly correct as regards the issue of immunity. The district court's about face ... is without support in law. Such judicial attitude would take this country back to an era when sovereign or international obligors could not be held to their commercial undertakings or their private law obligations. But it is now "beyond cavil that part of the foreign relations law recognized by the United States is that the commercial obligations of a foreign government may be adjudicated in those courts otherwise having jurisdiction to enter such judgments"; we know of no reason why the same rules of legal responsibility should not apply to an international organization, even absent a specific treaty stipulation.[28]

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[28] Brief for the United States as Amicus Curiae 8-10, *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465) (dated and filed in the D.C. Circuit as of October 1978) (citations, alteration, and footnote omitted). A footnote refers to the immunity article of the OAS Charter (quoted in the Appendix hereto) and concludes: "Nothing in the Charter immunizes the O.A.S. from suit on its commercial obligations." *Id.* at 10 n.1; *see also id.* at 6 (IOIA establishes "in language admitting of no ambiguity" that IOs enjoy the "same" immunity as foreign governments, thereby mandating resort to the FSIA as the relevant body of law defining those

The Executive Branch reaffirmed this clear legal position consistently from the earliest days of the FSIA era onward. On June 24, 1980, the Legal Adviser of the Department of State wrote to the General Counsel of the Equal Employment Opportunity Commission:

> By virtue of the FSIA, and unless otherwise specified in their constitutive agreements, international organizations are now subject to the jurisdiction of our courts in respect of their commercial activities, while retaining immunity for their acts of a public character.[29]

The same position has been reiterated in subsequent judicial filings,[30] as well as in communications with

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immunities). The D.C. Circuit did not need to decide on the applicability of the FSIA criteria because it found that under either an absolute or a restrictive theory, defendant would have been immune on a claim involving an employment dispute. To similar effect, *see Tuck v. Pan American Health Organization*, 668 F.2d 547 (D.C. Cir. 1981); *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983).

[29] Letter from Roberts B. Owen, Legal Adviser of the Department of State, to Leroy D. Clark, General Counsel of the Equal Employment Opportunity Commission (June 24, 1980), excerpted in Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 Am. J. Int'l L. 917, 918 (1980).

[30] *See* Br. of United States as *Amicus Curiae* at 14, *Corrinet v. United Nations*, No. 96-17130 (9th Cir. Mar. 12, 1997), 1997 WL 33702375 ("Since Section 2 of the [IOIA] grants international organizations the same immunities as 'foreign governments,' the FSIA in effect defines the immunities that international organizations as institutions enjoy under the IOIA." (footnote omitted)). IOIA immunities and FSIA immunities were treated as analogous in another case in which the Government intervened to

Congress.[31] It was likewise treated as the presumptively correct statement of the relationship between the IOIA and the FSIA when the law on this point was authoritatively restated in the *Restatement (Third) of the Foreign Relations Law of the United States*.[32] As

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defend the constitutionality of the IOIA in a suit by an employee contesting her dismissal. *See* Br. for the United States as Intervenor at 3, *Veiga v. World Meteorological Org.*, No. 08-3999cv (2d Cir. May 1, 2009), 2009 WL 8186687 (stating that IOIA "is a natural application of the immunity of the foreign states that comprise such international organizations").

[31] *See* Letter of Submittal, Headquarters Agreement with Organization of American States, S. Treaty Doc. No. 102-40 (Sept. 21, 1992), requesting Senate to give advice and consent under Article II of the Constitution to an agreement that would afford the OAS "full immunity from judicial process thus going beyond the *usual United States practice of affording restrictive immunity*. In exchange, however, the Agreement requires that the OAS 'make provision for appropriate modes of settlement of those disputes for which jurisdiction would exist against a foreign government under the Foreign Sovereign Immunities Act'." S. Treaty Doc. No. 102-40 (1992), *reprinted in Digest of United States Practice in International Law 1991-1999*, at 1015, 1016-17 (Sally J. Cummins & David P. Stewart, eds., 2005) (emphasis added).

[32] *Restatement (Third) of the Foreign Relations Law of the United States*, § 467 reporters' note 4 (1987) ("it would appear that the Foreign Sovereign Immunities Act has the effect of applying the restrictive theory also to international organizations generally"). The *Restatement* likewise follows the U.S. government's position in finding that international agreement-based immunities prevail over statutory default rules; that the United Nations, U.N. specialized agencies, and the Organization of American States enjoy agreement-based immunities; and that even under a restrictive theory of immunity, employment disputes with international organizations are not "commercial" and thus remain immune. *Id.* § 467, cmt. d and reporters' note 4. The *Restatement (Fourth) of the*

Judge Pillard properly stated in her concurrence in the opinion below, the "considered view" of the Executive Branch throughout the FSIA era has been in favor of applying the restrictive theory of immunity to international organizations.[33]

Amici submit that this considered view is also correct. As demonstrated below, applying the FSIA's restrictive approach to the immunities of IOs is consistent with the IOIA itself and provides the best set of default rules for IOs, in the absence of conflicting or more specific rules in agreements to which the United States is party, which would necessarily prevail.

The Executive Branch's considered view has also been consistent. As detailed above, the Government has long maintained that the FSIA's criteria apply to IOs under the IOIA. This Court has paid "special attention" to the Government's views on construction of statutes in the foreign relations domain, such as the FSIA, which, like the IOIA, was drafted in the Executive Branch and finalized in close consultation with the Department of State. Cf. *Helmerich & Payne*, 137 S. Ct. at 1320-21. The greater the consistency of the Government's positions, the greater should be the Court's deference; little deference need be accorded if it should happen that the Government suddenly shifts position here.[34] (*Amici*

Foreign Relations Law of the United States, to be published later this year, does not address IO immunities.

[33] *Jam v. Int'l Fin. Corp.*, 860 F.3d 703, 710 (D.C. Cir. 2017) (Pillard, J., concurring).

[34] *See, e.g., N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12, 538 n.29 (1982) (holding that, although "th[e] Court normally accords

have no information, at the time of this brief's submission, as to whether the U.S. Government will submit a brief to this Court in the present case, or if so, what its position will be.)

B. The IOIA/FSIA Combination Ensures Fulfillment of All U.S. Obligations Under International Agreements for Immunities of IOs.

The application of the immunity principles codified in the FSIA to IOs would preserve and prioritize those U.S. obligations under international agreements that grant higher (or lower) levels of immunity than specified in the FSIA to certain IOs. Section 1604 of the FSIA makes clear that the FSIA principles are "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act." 28 U.S.C. § 1604. Selected "existing international agreements," focusing on the 1945-1955 period, are listed and their immunities clauses quoted in Appendix B. To the extent there might be any conflict between these agreements and the FSIA, these agreements prevail over the FSIA's default rules.[35]

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great deference to" the United States' interpretation of a statute, deference is not appropriate when "there is no consistent administrative interpretation").

[35] An international agreement with domestic effect entered into after 1976 would also prevail over the FSIA's default rules under the later-in-time rule. *See, e.g., Whitney v. Robertson*, 124 U.S. 190, 195 (1888).

Some of these agreements, like the Convention on the Privileges and Immunities of the United Nations,[36] call for dismissal of any suit or legal process brought against the organization in the courts of any party. Other agreements generally provide only functional immunity by granting the IO "such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes,"[37] in which case the courts must interpret the treaty to determine which immunities are "necessary for the exercise of its functions" and then confer the appropriate level of functional—but not absolute—immunity. Still other agreements, especially those applicable to IOs whose principal functions are commercial in character, provide *sui generis* rules for the immunities of the particular IO, in light of what is deemed "necessary" for the fulfillment of their respective functions.

Because the FSIA fully preserves "existing international agreements," agreements requiring the United States to provide a given level of immunity to a particular IO would be completely honored. Application of FSIA principles to IOs would thus preserve the precise balance carefully negotiated among the parties to each international agreement—and the scope of immunity accorded IOs under these agreements would

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[36] 21 U.S.T. 1418, T.I.A.S. No. 6900, 1 U.N.T.S. 15.

[37] Charter of the Organization of American States, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3.

be neither higher nor lower than the agreement requires.[38]

C. Except as Specifically Required by U.S. International Agreements, IOs Are Not Entitled to Different Immunities Than Foreign States.

Unless an international agreement or IO-specific statute requires a different level of immunity, IOs should be governed by the "same immunity" rules that have applied since 1976 to foreign governments. Failure to do so would produce numerous anomalies.

Obvious anomalies would arise in the commercial sphere. Certain IOs, particularly international financial institutions, regularly engage in commercial transactions with private parties and with foreign states whose corresponding activities have not been entitled to immunity under U.S. practice since at least 1952 and are non-immune under the legal principles codified in the 1976 FSIA. There is no logic to an asymmetry in which IOs could completely avoid suit in U.S. courts for claims arising from their commercial activities, while the parties with which the IOs deal have no such immunity. This is especially true where the IO in question manifestly strives to make a profit on its commercial activities.

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[38] As explained above, the Executive Branch's position confirms that "supervening treaty provisions" would take priority over the default rules of the IOIA or the FSIA. *See* Letter from Roberts B. Owen, *supra* n.29; *see also* Br. for the United States as Amicus Curiae in *Corrinet*, *supra* n.30.

Property rights provide a further illustration. Surely if a foreign state is non-immune in an action involving "rights in immovable property situated in the United States,"[39] it would be highly anomalous for an IO to be absolutely immune from suit involving comparable rights—perhaps even in the same property.[40]

Another set of anomalies would arise in relation to the treatment of individuals who serve as foreign governments' representatives in or to IOs and the officers and employees of IOs and their immediate families. By virtue of other provisions of the IOIA, both of these groups of individuals are entitled to the "same privileges, exemptions, and immunities as are accorded under similar circumstances to officers and employees, respectively, of foreign governments, and members of their families." [41] However, those privileges and immunities have unquestionably changed since 1945. After the Vienna Conventions on Diplomatic and Consular Relations took effect for the United States, Congress enacted the Diplomatic Relations Act of 1978,

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[39] FSIA, § 1605(a)(4).

[40] Cf. *Permanent Mission of India to United Nations v. City of New York*, 551 U.S. 193 (2007) (involving tax liens imposed for nonpayment of taxes assessed on portions of property used for commercial activities). IOs, no less than government missions, might potentially own property used partly for commercial activity. In the absence of an agreement with the IO to confer more immunity than foreign states enjoy in similar circumstances, the court should apply the "same immunity" to both.

[41] 22 U.S.C. § 288d(a); *see also id.* § 288a(d) (specifying that, as to customs duties, taxes, and treatment of official communications, the privileges, exemptions, and immunities of IOs "shall be those accorded under similar circumstances to foreign governments").

28 U.S.C. § 1351 *et seq.* ("DRA"). The DRA provides that the then-new Vienna Convention standards are now the applicable rules on immunity for foreign governments' diplomatic and consular agents, thereby replacing prior law going back to 1799. *See* 92 Stat. 808, 808, Pub. L. No. 95-393 (1978) ("Establishment of the Vienna Convention as the United States law on diplomatic privileges and immunities."). The DRA harmonizes the treatment of IO personnel and representatives to IOs with the then-recently-codified Vienna Convention standards, thereby replacing the blanket immunity of the pre-1945 era with the more finely-tuned modern rules.

This change contradicts the view that IO immunities were frozen in 1945 and oblivious to any subsequent changes in foreign governmental immunities. Otherwise, Congress would not have extended the DRA to IO-related personnel, and the immunities of IO-related personnel would have resisted the modernizations in diplomatic and consular law that adjusted the privileges and immunities of foreign governmental personnel.

D. Application of the FSIA's Restrictive Principles to IOs Would Lift Immunity Only Where There is Sufficient U.S. Nexus to Justify Federal Jurisdiction.

Judicial application of the FSIA's criteria in suits against IOs would not open the floodgates to litigation lacking a genuine connection to the United States. The waiver exception (§ 1605(a)(1)) would only be applicable if the IO had agreed, "either explicitly or by implication," to submit itself to the jurisdiction of U.S. courts for the

claims in question.[42] The commercial activities exception (§ 1605(a)(2)) would only be applicable by its terms to a commercial activity carried on in the United States or having a direct effect in the United States.[43] The property exception (§ 1605(a)(4)) would only apply to litigation over "rights in immovable property situated in the United States."[44] And the noncommercial tort exception (§ 1605(a)(5)) would only apply to torts "occurring within the territorial jurisdiction of the United States."[45]

Amici express no view on whether any of these exceptions would reach the conduct pleaded in the present action. Since the court below dismissed the case on the basis of an incorrect holding that IOs enjoy absolute immunity and that the FSIA criteria are not applicable to actions against IOs, there has not yet been any judicial examination of the potential applicability of one or more of the FSIA's exceptions. With this Court having granted certiorari to determine whether the "same immunity" under the IOIA is the same as under

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[42] Cf. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014). Section 1604 would apply to waivers of immunity in existing international agreements. *See supra* Part II.B.

[43] Cf. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015).

[44] Cf. *Permanent Mission of India to United Nations*, 551 U.S. at 196-97.

[45] Cf. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989). Other exceptions to immunity, such as the expropriation exception (§ 1605(a)(3)), the state-sponsored terrorism exception (§ 1605A), and the exception for acts of terrorism in the United States (§ 1605B) appear highly unlikely to apply to IOs.

the FSIA, it should decide that question in the affirmative and remand with instructions to the courts below to decide which if any of the FSIA's exceptions might render the Respondent non-immune in the present case. That decision would be made "[a]t the threshold of the action" and should not require protracted factual development.[46]

CONCLUSION

For all these reasons, this Court should reverse the ruling of the D.C. Circuit below and remand for assessment of Respondent's plea of immunity in light of the FSIA's comprehensive criteria.

Respectfully submitted,

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[46] *Helmerich & Payne*, 137 S. Ct. at 1324 (internal quotation marks omitted) (bracket in original); *see also id.* at 1317 (holding that factual disputes about entitlement to immunity, if any, should be resolved "as near to the outset of the case as is reasonably possible").

APPENDIX

Appendix A
LIST OF *AMICI CURIAE*[*]

José E. Alvarez is the Herbert and Rose Rubin Professor of International Law at NYU School of Law, a former President of the American Society of International Law, and a former co-Editor in Chief of the American Journal of International Law.

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International Law, and a former co-Editor in Chief of the American Journal of International Law. From 1977 to 1981, she served as an attorney in the U.S. Department of State, including as special assistant to Legal Adviser Roberts B. Owen.

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Harold Hongju Koh is Sterling Professor of International Law at Yale Law School. From 2009 to 2013, he served as Legal Adviser of the U.S. Department of State; from 1998 to 2001, he served as Assistant Secretary of State for Democracy, Human Rights and Labor; and from 1983 to 1985, he served as Attorney-Adviser, Office of Legal Counsel, U.S. Department of Justice.

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Appendix B
List of U.S. Treaties and Agreements on Immunities of International Organizations, 1945-1955 (Chronological by Date of Signature)*

1. **Charter of the United Nations and Statute of the International Court of Justice, 59 Stat. 1031, 1053, T.S. 993**

Signed: San Francisco, June 26, 1945

Entered into force: October 24, 1945

Article 105(1): "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes."

2. **Constitution of the Food and Agriculture Organization of the United Nations, 12 U.S.T. 980, 996, T.I.A.S. No. 4803**

Signed: Quebec, October 16, 1945

Entered into force: October 16, 1945

Authorized by joint resolution of Congress approved July 31, 1945 (59 Stat. 529)

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* The discussion of different treaties and agreements in this appendix uses different terminology to reflect the different ways in which the treaties and agreements were concluded, brought into force, and implemented. Wherever possible we have followed the usage in the Treaties in Force compendium promulgated by the U.S. Department of State. *See* U.S. Department of State, Treaties in Force (2018); Status of Multilateral Treaties Deposited with the United Nations Secretary-General (treaties.un.org.); and websites of the indicated international organizations.

Article XVI: "Legal Status.

1. The Organization shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Constitution.

2. Each Member Nation and Associate Member undertakes, insofar as it may be possible under its constitutional procedure, to accord to the Organization all the immunities and facilities which it accords to diplomatic missions, including inviolability of premises and archives, immunity from suit, and exemptions from taxation."

3. Constitution of the United Nations Educational, Scientific and Cultural Organization, 61 Stat. 2495, 2503, T.I.A.S. No. 1580, 4 U.N.T.S. 275, 292

Concluded: London, November 16, 1945

Entered into force: November 4, 1946 by virtue of joint resolution approved July 30, 1946 (Pub. L. No. 79-565, 22 U.S.C. § 287); reentered into force for the United States October 1, 2003; withdrawal notified October 12, 2017, to take effect December 31, 2018

Article XII: Legal status of the Organisation: "The provisions of Articles 104 and 105 of the Charter of the United Nations Organisation concerning the legal status of that Organisation, its privileges and immunities shall apply in the same way to this Organisation."

4. Articles of Agreement of the International Monetary Fund, 60 Stat. 1401, 1413, T.I.A.S. No. 1501, 2 U.N.T.S. 39, 74

Formulated: Bretton Woods Conference, July 1-22, 1944

Opened for signature: Washington, December 27, 1945

Entered into force: December 27, 1945 (authorized and implemented by Bretton Woods Agreements Act of 1945, enacted July 31, 1945, Pub. L. No. 171, ch. 339, 79th Cong., 1st Sess., 22 U.S.C. § 286 et seq.)

Article IX(3): "The Fund, its property and its assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that it expressly waives its immunity for the purpose of any proceeding or by the terms of any contract."

5. Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, 1457-58, T.I.A.S. No. 1502, 2 U.N.T.S. 134, 180

Formulated: Bretton Woods Conference, July 1-22, 1944

Opened for signature: Washington, December 27, 1945

Entered into force: December 27, 1945 (authorized and implemented by Bretton Woods Agreements Act of 1945, enacted July 31, 1945, Pub. L. No. 79-171, ch. 339, 22 U.S.C. § 286 et seq.)

Article VII(3): "Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting

service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank."

6. **Convention on the Privileges and Immunities of the United Nations, 21 U.S.T. 1418, 1422, T.I.A.S. No. 6900, 1 U.N.T.S. 15, 16, 18**

Done: New York, February 13, 1946

Entered into force: September 17, 1946 for other parties

Entered into force for the United States: April 29, 1970 (following Senate consent to Art. II treaty under U.S. Constitution March 19, 1970)

Article II(2): "The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."

7. **Constitution of the World Health Organization, 62 Stat. 2679, 2692, T.I.A.S. No. 1808, 14 U.N.T.S. 185, 201**

Signed: New York July 22, 1946

Entered into force: April 7, 1948 for other parties

Entered into force for the United States: June 21, 1948, by virtue of joint resolution approved June 14, 1948 (Pub. L. 643, 80th Congress, 22 U.S.C. § 290)

Article 67(a): "The Organization shall enjoy in the territory of each Member such privileges and immunities as may be necessary for the fulfilment of its objectives and for the exercise of its functions."

Article 68: "Such legal capacity, privileges and immunities shall be defined in a separate agreement to be prepared by the Organization in consultation with the Secretary-General of the United Nations and concluded between the Members."

8. **Instrument for the Amendment of the Constitution of the International Labor Organization, 62 Stat. 3485, 3552, 3554, T.I.A.S. No. 1868, 15 U.N.T.S. 35, 102, 104**

Dated: Montreal, October 9, 1946

Entered into force: April 20, 1948; reentered into force for the United States February 18, 1980, authorized pursuant to joint resolution approved June 30, 1948 (22 U.S.C. § 271)

Article 40: "Privileges and Immunities.

1. The International Labour Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Delegates to the Conference, members of the Governing Body and the Director-General and officials of the Office shall likewise enjoy such privileges and

immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. Such privileges and immunities shall be defined in a separate agreement to be prepared by the Organization with a view to its acceptance by the [States] Members."

9. Constitution of the International Refugee Organization, 18 U.N.T.S. 3

Opened for signature: December 15, 1946

Signed by the United States: July 1, 1947, subject to provisions of Senate joint resolution July 1, 1947

Entered into force: August 20, 1948

Terminated: December 31, 1951

Article 13: "Status, Immunities and Privileges.

1. The Organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its objectives.

2(a). The Organization shall enjoy in the territory of each of its members such privileges and immunities as may be necessary for the exercise of its functions and the fulfilment of its objective.

2(b). Representatives of members, officials and administrative personnel of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

3. Such legal status, privileges and immunities shall be defined in an agreement to be prepared by the Organization after consultation with the Secretary-General of the United Nations. The agreement shall be open to accession by all members and shall continue in force as between the Organization and every member which accedes to the agreement."

10. **Agreement between the United Nations and the United States of America and the respecting the headquarters of the United Nations, 61 Stat. 3416, T.I.A.S. No. 1676, 11 U.N.T.S. 11**

Signed: Lake Success, June 26, 1947

Entered into force: November 21, 1947; authorized pursuant to Joint Resolution of Congress, 61 Stat. 756 (August 4, 1947)

11. **Convention of the World Meteorological Organization, with related protocol, 1 U.S.T. 281, 292, T.I.A.S. No. 2052, 77 U.N.T.S. 143, 162**

Done: Washington, October 11, 1947

Entered into force: March 23, 1950; ratified by the United States May 4, 1949

Article 27(b)(i): "The Organization shall enjoy in the territory of each Member to which the present Convention applies such privileges and immunities as may be necessary for the fulfilment of its purposes and for the exercise of its functions."

12. Convention on the Intergovernmental Maritime Consultative Organization, 9 U.S.T. 621, 634, 645, T.I.A.S. No. 4044, 289 U.N.T.S. 48, 70, 72, 104

Signed: Geneva, March 6, 1948; accepted by the United States August 17, 1950

Entered into force: March 17, 1958

Article 50: "The legal capacity, privileges and immunities to be accorded to, or in connection with, the Organization, shall be derived from and governed by the General Convention on the Privileges and Immunities of the Specialized Agencies approved by the General Assembly of the United Nations on the 21st November, 1947, subject to such modifications as may be set forth in the final (or revised) text of the Annex approved by the Organization in accordance with Sections 36 and 38 of the said General Convention."

Article 51: "Pending its accession to the said General Convention in respect of the Organization, each Member undertakes to apply the provisions of Appendix II to the present Convention."

Appendix II, Section 2(a): "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes and the exercise of its functions."

13. Charter of the Organization of American States, 2 U.S.T. 2394, 2435, T.I.A.S. No. 2361, 119 U.N.T.S. 3, 88

Signed: Bogotá, Colombia, April 30, 1948

Entered into force: December 13, 1951

Article 103: "The Organization of American States shall enjoy in the territory of each Member such legal capacity, privileges[,] and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes."

14. **Agreement on the Status of the North Atlantic Treaty Organization, National Representatives, and International Staff, 5 U.S.T. 1087, 1092, T.I.A.S. No. 2992, 200 U.N.T.S. 3, 6**

Done: Ottawa, September 20, 1951

Entered into force: May 18, 1954

Article 5: "The Organization, its property and assets, wheresoever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case the Chairman of the Council Deputies, acting on behalf of the Organization, may expressly authorize the waiver of this immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution or detention of property."

15. **International Finance Corporation, Articles of Agreement, 7 U.S.T. 2197, 2214, T.I.A.S. No. 3620, 264 U.N.T.S. 118, 142**

Done: Washington, May 25, 1955; authorized and implemented by International Finance Corporation Act of 1955, Pub. L. No. 350, Ch. 788, 84th Cong., 1st Sess. (1955)

Entered into force: July 20, 1956

Article VI(3): "Actions may be brought against the Corporation only in a court of competent jurisdiction in the territories of a member in which the Corporation has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members."